
A Band-Aid Fix: Section 1557 of the Affordable Care Act and the Need for Federal Laws to Protect Transgender People in Healthcare

“Your trans status is on display and on parade . . . ,’ Corado said, reflecting on insensitive medical professionals who have asked her such questions as, ‘What are you?’”¹

I. INTRODUCTION

Transgender and gender-nonconforming people are among the most marginalized and disfavored sexual minorities in contemporary American society.² The stigmatization of transgender people is particularly prevalent in healthcare, where transgender people report feeling unsafe, misunderstood, and sometimes

1. Neda Ulaby, *Health Care System Fails Many Transgender Americans*, NPR (Nov. 21, 2017, 4:29 PM), <https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans> [<https://perma.cc/2YKE-F34Q>].

2. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 621, 624 (4th Cir. 2020) (Wynn, J., concurring) (describing marginalization of transgender individuals); MOVEMENT ADVANCEMENT PROJECT, *LGBTQ POLICY SPOTLIGHT: MAPPING LGBTQ EQUALITY: 2010 TO 2020*, at 4-6 (2020), <https://www.lgbtmap.org/file/2020-tally-report.pdf> [<https://perma.cc/UGK7-JHPP>] (mapping variations and inconsistencies between state laws protecting transgender people); A SURVEY OF LGBT AMERICANS, ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES, PEW RSCH. CTR. 32 (2013), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf [<https://perma.cc/X9VN-G7PS>] (comparing acceptance of transgender people with acceptance of other LGBT community members); see also *Transgender*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/transgender> [<https://perma.cc/C8HR-UBV9>] (defining transgender). A transgender person’s gender identity differs from, or is in opposition to, that person’s sex assigned at birth. See *Transgender*, *supra*; see also Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOCIO. F. 809, 810 (2015) (explaining definition of transgender person). Gender nonconformity is when an individual’s gender expression does not conform to the cultural or societal expectations of how that particular gender should act. See Miller & Grollman, *supra*, at 810; Suresh Bada Math & Shekhar P. Seshadri, *The Invisible Ones: Sexual Minorities*, 137 INDIAN J. MED. RSCH. 1, 1 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3657897/?report=printable> [<https://perma.cc/48PS-C4XE>] (defining sexual minority). Sexual minorities are people whose sexual identities differ from the majority of society, particularly hetero-normative society. Math & Seshadri, *supra*, at 1. Sexual minorities include transgender, gay, lesbian, and bisexual people. *Id.*; see Daniel C. Lewis et al., *Degrees of Acceptance: Variation in Public Attitudes Toward Segments of the LGBT Community*, 70 POL. RSCH. Q. 861, 871 (2017) (concluding participants more accepting of gay people than transgender people). Researchers found that participants, in general, expressed “warmer feelings” towards gay people than transgender and gender-nonconforming people. See Lewis et al., *supra*, at 871. The study also found that respondents were more likely to support antidiscrimination policies for gay and lesbian people in comparison to the same protections for transgender people. See *id.* In 2020, only twenty states and the District of Columbia had affirmative protections for transgender people in employment, housing, and public accommodations. See MOVEMENT ADVANCEMENT PROJECT, *supra*, at 12.

verbally harassed by medical providers.³ Some transgender people avoid going to the doctor at all, even when medically necessary, because they fear mistreatment or disrespect.⁴ Transgender people are also less likely to have insurance due to discrimination by health insurers because of their transgender status and other barriers.⁵ Societal discrimination causes serious psychological distress among transgender people, which in turn results in an attempted suicide rate that is nearly nine times higher than that of the general U.S. population.⁶ Following a suicide attempt, a transgender person is less likely to receive medical attention and treatment than the general population.⁷ These often fatal consequences are preventable, and the solution begins with equal access to health-care services and federal protections for gender identity discrimination.⁸

The Patient Protection and Affordable Care Act (ACA)—a major healthcare reform act passed during President Obama’s Administration—sought to increase access to comprehensive health insurance while lowering health-care costs.⁹ The ACA’s civil rights provision, section 1557, prohibits health-care providers and

3. See SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 96-97 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/5BHN-XGYW>] (reporting transgender people’s negative experiences with providers). Thirty-three percent of transgender survey respondents reported at least one negative experience with a healthcare provider related to being transgender. See *id.* at 96. These reported experiences included inadequate care, refusal of treatment, and having to teach providers about certain aspects of transgender health concerns in order to receive appropriate care. See *id.*

4. See *id.* at 98 (acknowledging transgender people who avoided treatment altogether). Twenty-three percent of transgender respondents avoided seeing a health-care provider for fear of being disrespected or mistreated as a transgender person. See *id.*

5. See Gilbert Gonzales & Carrie Henning-Smith, *Barriers to Care Among Transgender and Gender Non-conforming Adults*, 95 MILBANK Q. 726, 739-40 (2017) (finding disparities in transgender adults’ access to care). Compared to the general U.S. population, transgender adults are more likely to be uninsured, experience barriers to care because of cost, and have no consistent source of care. See *id.* at 739.

6. See JAMES ET AL., *supra* note 3, at 5, 114 (reporting 40% attempted suicide rate of transgender people and connecting discrimination and mental health). Thirty-nine percent of transgender respondents reported severe psychological distress compared to only 5% of the general U.S. population. *Id.* at 105. Additionally, 53% of survey respondents between the ages of eighteen and twenty-five reported severe distress because of discrimination based on their transgender identity. *Id.* at 106. Moreover, 48% of respondents reported seriously contemplating suicide during 2015, compared to only 4% of the general U.S. population. *Id.* at 112.

7. See *id.* at 114. Only 45% of transgender survey respondents received medical care following a suicide attempt compared to 60% of the general U.S. population. *Id.* Moreover, only 30% of transgender people stayed in a hospital for at least one night following a suicide attempt compared to 41% of the general population. *Id.*

8. See Ulaby, *supra* note 1 (discussing relationship between suicide and lack of health care); Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, 58 J. HOMOSEXUALITY 10, 40 (2011), <https://www.tandfonline.com/doi/pdf/10.1080/00918369.2011.534038> [<https://perma.cc/PJ6W-F9RE>] (noting nondiscrimination protections for transgender people may combat high suicide rates in transgender community); see also Judson Adams et al., *Transgender Rights and Issues*, 21 GEO. J. GENDER & L. 479, 495-96 (2020) (connecting access to healthcare and mental health). Physicians report a dramatic reduction in suicide attempts by transgender people when transgender people have access to affirmative care from providers who accept and understand their gender identity. See Ulaby, *supra* note 1.

9. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in the scattered sections of 26 and 42 U.S.C.) (enacting ACA); Sarah E. Gage, Note, *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 NEW ENG. L. REV. 499, 510 (2015) (discussing overarching policy goals of ACA).

insurance health plans from discriminating against a patient on the basis of sex, race, or national origin.¹⁰ To further clarify the scope of section 1557’s sex discrimination protections, the Office for Civil Rights (OCR), acting under President Obama’s Department of Health and Human Services (HHS), promulgated a regulation defining section 1557’s sex discrimination provision to include discrimination based on sex stereotyping and gender identity.¹¹ By including sex stereotyping and gender identity in the definition of sex discrimination, the Obama-era regulation afforded further protections for the transgender and gender-nonconforming communities.¹² In 2016, a group of religiously affiliated health-care providers and eight states seeking to limit the scope of section 1557 to the binary sexes (male and female) challenged the Obama-era regulation in court.¹³ The district court judge—dubbed the “go-to judge” for conservative litigants—found for the providers and enjoined part of the regulation on the grounds that section 1557 protected only the binary sexes and reasoned HHS had exceeded its authority by broadening the definition of sex discrimination to include gender identity discrimination.¹⁴ HHS, under President Trump’s

10. See 42 U.S.C. § 18116 (codifying antidiscrimination provision of section 1557); see also 42 U.S.C. § 2000d (codifying Title VI protections on basis of race, color, and national origin); 20 U.S.C. § 1681 (codifying Title IX of the Education Amendments (Title IX) protections “on the basis of sex”). Section 1557 of the ACA states:

[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 . . . be excluded from participation in . . . or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal finance assistance.

42 U.S.C. § 18116.

11. See *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376, 31,387 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (defining “on the basis of sex” used in section 1557). The regulation defines discrimination “on the basis of sex” to include discrimination on the basis of gender identity and sex stereotyping. See *id.*

12. See *id.* at 31,388 (noting transgender status relates to expression of gender identity). The regulations explain that a transgender person’s gender identity, i.e., expression of gender, differs from the sex they were assigned at birth and is therefore included in references to “gender identity.” See *id.* at 31,384.

13. See *Franciscan All., Inc. v. Burwell (Franciscan Alliance I)*, 227 F. Supp. 3d 660, 670-71 (N.D. Tex. 2016). Plaintiffs argued that the scope of section 1557 should be limited to Title IX’s “unambiguous definition” of sex as “the immutable, biological differences between males and females” acknowledged at birth. *Id.*

14. See *Texas Judge Reed O’Connor is the ‘Go-To Judge’ for Conservatives*, AP NEWS (Dec. 21, 2018), <https://apnews.com/2a9aa1a2f1814b83a4c25ff07ae109db> [<https://perma.cc/XAY8-XPBR>] (explaining lawsuits before Judge O’Connor demonstrate parties choosing judges friendly to parties’ political ideologies); *Franciscan Alliance I*, 227 F. Supp. 3d at 689, 696 (finding ACA adopted binary definition of sex and enjoining defendants). The court opined that section 1557’s incorporation of Title IX demonstrates Congress’s intent to adopt the binary definition of sex as it relates to sex discrimination. See *Franciscan Alliance I*, 227 F. Supp. 3d at 688, 694 (finding providers face irreparable harm if regulation not enjoined). The district court later vacated part of the Obama-era regulation. See *Franciscan All., Inc. v. Azar (Franciscan Alliance II)*, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019) (vacating “unlawful portions” of Obama-era rule relating to gender identity); see also Katie Keith, *Another Court Vacates LGBTQ-Specific Rollbacks from New 1557 Rule*, HEALTH AFFS.: FOLLOWING THE ACA (Sept. 4, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200904.528322/full/> [<https://perma.cc/H5N5-K3ZP>] (discussing *Franciscan Alliance II* court’s vacatur of “gender identity” from definition of sex

Administration, asked for a stay of the proceedings so that the agency could revise the rule.¹⁵ In June of 2020, in an attempt to exclude transgender people from the ACA's discrimination protections, President Trump's HHS issued a new rule repealing the Obama-era regulation, specifically its inclusive definition of sex discrimination, and explaining that sex discrimination is meant to protect only the biological sexes.¹⁶ Nevertheless, at least two federal courts have enjoined the Trump rule in light of the Supreme Court's decision in *Bostock v. Clayton County*,¹⁷ which held that transgender discrimination constitutes discrimination "on the basis of sex" under Title VII of the Civil Rights Act of 1964 (Title VII).¹⁸

This Note will evaluate the protections section 1557 of the ACA originally afforded to transgender patients and the need for federal protections of transgender people in order to remedy stigma-driven health disparities.¹⁹ While this Note focuses on the transgender experience, the issues may apply broadly to other gender-nonconforming persons, including nonbinary and genderqueer individuals.²⁰ Part II will examine the harmful effects of discrimination on

discrimination). It should be noted that, in issuing the vacatur, the *Franciscan Alliance II* court did not set aside the Obama rule's protections based on sex stereotyping—i.e., the court did not vacate the part of the rule's definition that describes discrimination "on the basis of sex" to include discrimination based on sex stereotypes; it only vacated "gender identity" from the definition. See Keith, *supra*. Courts have interpreted discrimination claims based on sex stereotyping to include transgender discrimination claims. *Id.*

15. Katie Keith, *HHS Proposes to Strip Gender Identity, Language Access Protections from ACA Anti-Discrimination Rule*, HEALTH AFFS.: FOLLOWING THE ACA (May 25, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/> [<https://perma.cc/3CNB-GR73>] (reporting HHS requested stay and voluntary remand to revise rule).

16. See *Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. 37,160, 37,178 (June 19, 2020) (to be codified at 45 C.F.R. pts. 86, 92, 147, 155, 156) (explaining sex discrimination constitutes discrimination because "an individual is biologically male or female"). HHS's justification for revising the rule was to "better comply with the mandates of Congress, address legal concerns, relieve billions of dollars in undue regulatory burdens, further substantive compliance, reduce confusion, and clarify the scope of Section 1557." *Id.* at 37,160; see Katie Keith, *Court Vacates New 1557 Rule That Would Roll Back Antidiscrimination Protections for LGBT Individuals*, HEALTH AFFS.: FOLLOWING THE ACA (Aug. 18, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200818.468025/full/> [<https://perma.cc/D8MZ-FTH8>] (explaining Trump Administration's "significant changes" to Obama rule). Although the Trump Administration's rule eliminated the Obama Administration's definition of "discrimination 'on the basis of sex,'" the Trump Administration declined to create a new explicit definition of sex discrimination. See Keith, *supra*. Instead, it made clear in the new rule's preamble that it would interpret "sex" to mean only "biological sex"—male and female. See *id.*

17. 140 S. Ct. 1731 (2020).

18. See *id.* at 1743 (holding Title VII's "plain terms" have always prohibited discrimination of transgender and gay people); *Walker v. Azar*, No. 20-CV-2834, 2020 WL 4749859, at *1 (E.D.N.Y. Aug. 17, 2020) (granting preliminary injunction of Trump sex discrimination rule in light of *Bostock* case); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. 20-1630, 2020 WL 5232076, at *1 (D.D.C. Sept. 2, 2020) (issuing injunction to prevent repeal of Obama-era "on the basis of sex" definition).

19. See *infra* Part III.

20. See *supra* note 2 (defining transgender and gender nonconforming); see also JAMES ET AL., *supra* note 3, at 23 (noting respondents to survey on transgender discrimination include genderqueer, nonbinary, and other gender-nonconforming identities); *Nonbinary*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/nonbinary> [<https://perma.cc/7VPT-JK3D>] (defining nonbinary to include person whose gender identity not strictly male or female). Nonbinary and genderqueer individuals do not identify solely as male or female; rather, they may identify "between or beyond the male and female genders." See Shelby Hanssen,

transgender health, and how that discrimination alienates transgender people from the healthcare system.²¹ Part II will also explore the interpretation of sex discrimination in Title IX, Title VII, and Equal Protection cases, in order to understand the meaning of sex discrimination under the ACA.²² Parts III and IV will argue that, in drafting section 1557, Congress intended sex discrimination to include transgender discrimination, as demonstrated by section 1557's incorporation of Title IX, and by association, the definition of sex discrimination in Title VII cases.²³ Parts III and IV will also argue that, given the state of transgender health and the transgender community's vulnerability to COVID-19, this population is uniquely deserving of federal protection.²⁴ Further, this Note recognizes that the uncertain future of the ACA—and President Trump's repeal of the Obama-era regulation during a global pandemic—creates confusion regarding what rights are available to transgender patients, which could result in severe and even fatal consequences for transgender people.²⁵

II. HISTORY

A. *How Societal and Systemic Discrimination Negatively Affects Transgender Health and Access to Healthcare*

1. *The Marginalization of Transgender People in Society*

Despite a relatively low national unemployment rate for the U.S. population, transgender people are three times more likely to be unemployed than cisgender people.²⁶ Transgender people of color experience higher unemployment rates as

Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 287 (2017). Not all genderqueer, nonbinary, or gender nonconforming individuals identify as transgender, although “trans” and “transgender” are often used as umbrella terms to encompass many gender nonconforming identities. See *id.* at 287-88; Pamuela Halliwell, *The Psychological & Emotional Effects of Discrimination Within the LGBTQ, Transgender, & Non-Binary Communities*, 41 T. JEFFERSON L. REV. 222, 226 (2019) (comparing transgender and nonbinary identities in context of gender stereotypes). While a transgender person may identify with only the gender opposite of their assigned sex, nonbinary and gender nonconforming people may express or identify with both genders, neither genders, or only certain elements of each gender. See Halliwell, *supra*, at 226. Accordingly, this Note will use third-person plural pronouns such as “they,” “them,” and “theirs” when referring to transgender and gender-nonconforming people in order to avoid the risk of misgendering—i.e., using incorrect male or female pronouns. See Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 835 n.3 (2015). In contrast to transgender and gender-nonconforming individuals, a cisgender person's gender identity and expression of gender aligns with the sex that person was assigned at birth. See *id.* at 833.

21. See *infra* Part II.

22. See *id.*

23. See *infra* Parts III, IV.

24. See *id.*

25. See *id.*

26. See JAMES ET AL., *supra* note 3, at 141 (reporting employment disparities among transgender people). In 2015, the unemployment rate among transgender survey respondents was 15%, compared to 5% of the general U.S. population. *Id.*

compared to their white transgender counterparts.²⁷ According to the 2015 U.S. Transgender Survey, 13% of transgender respondents reported losing a job at some point in their life and believed it was because of their gender expression, with Native American, multiracial, and Black respondents among the most likely to lose a job because of their transgender identity.²⁸ Even more telling, more than half of respondents reported having to hide their transgender identity at work for fear of discrimination or mistreatment.²⁹ These fears are not unfounded, as 15% of employed survey respondents reported being harassed or discriminated against at work in 2015 alone.³⁰

Transgender people who have lost a job because of their gender identity are more likely to participate in the underground economy, which includes sex work, drug sales, and other criminalized activities.³¹ In general, one in five transgender survey respondents reported participating in the underground economy at some point in their lives, with transgender women of color among the most likely.³²

27. *See id.* (recognizing high levels of unemployment among transgender people of color and transgender people with disabilities). The unemployment rate is highest among Middle Eastern, American Indian, multiracial, Latinx, and African American transgender people. *Id.*

28. *See id.* at 149-50 (stating percentage of sample with termination attributable to discrimination of transgender employee's gender identity); *see also* Alex Schmider, *New U.S. Transgender Survey Has Compelling Data About Being Trans in America*, GLAAD (Dec. 8, 2016), <https://www.glaad.org/blog/new-us-transgender-survey-has-compelling-data-about-being-trans-america> [<https://perma.cc/S64P-JCRG>] (describing largest ever survey conducted on transgender community); Katy Steinmetz, *Beyond Bathrooms: Inside the Largest Ever Survey of Transgender People in America*, TIME (Dec. 8, 2016, 2:42 PM), <https://time.com/4595422/transgender-survey-data-united-states/> [<https://perma.cc/FZE7-W6S6>] (highlighting most comprehensive study to date). Of the transgender people who reported losing a job for their gender expression, Native Americans accounted for 21%, multiracial respondents 18%, and Black Americans 17%, while white Americans reported at only 12%. JAMES ET AL., *supra* note 3, at 150 fig.10.3. Nineteen percent of transgender people who applied for a job in the past year reported not being hired, being fired, or being denied a promotion because of their transgender status. *Id.* at 151. By way of example, one survey participant reported that the day before they were to begin a new job, human resources sent an email to all employees to "warn" them of the new employee's transgender status. *Id.* Soon thereafter, the management informed the employee that they could not use the bathroom associated with their gender identity. *Id.* When the transgender employee protested this decision—citing a city ordinance prohibiting the denial of bathroom access for transgender people—the employee was "fired the next day for no given reason." *Id.*

29. *See* JAMES ET AL., *supra* note 3, at 154 (noting most respondents not "out" to employers). Fifty-three percent of respondents stated that they hid their transgender identity at work. *Id.* Despite potentially impacting their financial stability, many transgender people quit their jobs to avoid discrimination and mistreatment. *See id.* at 155.

30. *See id.* at 153 (stating instances of harassment at work). Forms of reported workplace harassment included verbal harassment, physical attacks, and sexual assault. *See id.*

31. *See id.* at 158 (recognizing correlation between losing job because of transgender discrimination and employment in underground economy). The underground economy refers to work that is currently criminalized or unregulated in the United States, such as sex work or drug sales, as well as noncriminalized sex work like pornography. *See id.* at 41. Of respondents who reported working in the underground economy, transgender people who were fired for discriminatory reasons made up 37% of respondents, and undocumented transgender immigrants accounted for 38% of respondents. *Id.* at 158.

32. *See id.* at 158. Forty-four percent of transgender African American survey respondents reported working in the underground economy, in addition to 41% of Native American respondents, 38% of multiracial respondents, and 30% of Latinx respondents. *Id.* Only 20% of the survey's white, transgender respondents reported working in the underground economy. *See id.*

The 2015 survey also found a positive correlation between homelessness and the likelihood of participating in sex work.³³ In general, transgender people are three times as likely to experience homelessness compared to the general U.S. population and are also twice as likely to live in poverty.³⁴ Nearly one-third of transgender people reported being homeless at one point in their lives, and 12% reported facing housing discrimination for being transgender sometime during 2015.³⁵ These data demonstrate that the transgender community faces severe economic and housing instability at much higher rates than the general population.³⁶

2. *Barriers to Healthcare: Discrimination by Employers and Health Insurers and Problematic Patient-Physician Relationships*

Transgender people face both societal and systemic barriers to receiving adequate health care.³⁷ At the physician-patient level, many providers mistreat transgender patients due to the providers' discriminatory bias, as well as physicians' lack of training and understanding of transgender and nonbinary health needs.³⁸ Discriminatory bias by health-care providers not only decreases the chances of a transgender person receiving adequate care, but also discourages transgender people from seeking medical treatment at all.³⁹

33. See JAMES ET AL., *supra* note 3, at 160 (concluding respondents who experienced homelessness three times more likely to participate in sex work).

34. See *id.* at 177, 144.

35. *Id.* at 178. Transgender women of color are the most likely to experience a lack of housing. See *id.*

36. See *id.* at 5 (concluding study showed higher poverty, unemployment, and homelessness rates among transgender people).

37. See Gonzales & Henning-Smith, *supra* note 5, at 727 (determining transgender and gender-nonconforming adults face significant barriers in healthcare).

38. See JAMES ET AL., *supra* note 3, at 96 (discussing negative experiences with providers including harassment, inadequate care and training, and discrimination); see also Valarie K. Blake, *Remedying Stigma-Driven Health Disparities in Sexual Minorities*, 17 HOUS. J. HEALTH L. & POL'Y 183, 210 (2017) (noting stigma in patient-provider relationships particularly prominent among transgender patients); Kami Kosenko et al., *Transgender Patient Perceptions of Stigma in Health Care Contexts*, 51 MED. CARE 819, 821 (2013) (listing instances of medical mistreatment). Examples of physician insensitivity or harassment included misgendering the patient; open displays of the physician's discomfort, such as fidgeting, staring, or avoiding eye contact; verbal abuse wherein the physician mocked, belittled, or insulted the patient; and substandard care via rough handling of patients during examinations or keeping patients waiting for long periods of time. See Kosenko et al., *supra*, at 821.

39. See JAMES ET AL., *supra* note 3, at 98 (explaining some transgender people avoid medical care for fear of mistreatment); see also Gonzales & Henning-Smith, *supra* note 5, at 740 (concluding some transgender patients avoid treatment because of discrimination). Transgender people are more likely to lack consistent access to healthcare. See Gonzales & Henning-Smith, *supra* note 5, at 739; see also Alexandra Brandes, Comment, *The Negative Effect of Stigma, Discrimination, and the Health Care System on the Health of Gender and Sexual Minorities*, 23 TUL. J.L. & SEXUALITY 155, 160 (2014) (discussing effect of discrimination on transgender health). Discrimination by physicians discourages transgender patients from seeking medical care in the future. See Brandes, *supra*, at 160.

At the systemic level, the transgender community faces structural and economic barriers to accessing quality and affordable health care.⁴⁰ High unemployment rates among transgender people increase the likelihood that a transgender person is uninsured, as most health insurance programs are employment-based.⁴¹ Transgender people are often unable to afford healthcare expenses or pay for private insurance on the individual marketplace because of high unemployment rates in the community.⁴²

Transgender people are more likely to be uninsured, more likely to face problems obtaining insurance coverage, and once insured, more likely to be denied insurance coverage for routine healthcare needs.⁴³ Although not all transgender patients seek transition-related surgery or hormone therapy, insurers routinely deny coverage for these services as well, which further alienates transgender people from the healthcare system.⁴⁴

40. See Gonzales & Henning-Smith, *supra* note 5, at 728 (articulating barriers to healthcare system). These barriers are economic, social, and systemic. See *id.*

41. See *id.* (hypothesizing transgender employment discrimination prevents transgender people from obtaining employer-sponsored health insurance); see also EDWARD R. BERCHICK ET AL., U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2018, at 2 (2019), <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-267.pdf> [<https://perma.cc/Z7SL-NSQA>] (concluding employer-based health insurance most common form of private insurance among Americans); Brandes, *supra* note 39, at 157 (articulating relationship between employment and access to health insurance). Fifty-five percent of the U.S. population has employment-based health insurance. See BERCHICK ET AL., *supra*, at 2.

42. See Rachel C. Kurzweil, Note, “Justice Is What Love Looks Like in Public”: *How the Affordable Care Act Falls Short on Transgender Health Care Access*, 21 WASH. & LEE J. C.R. & SOC. JUST. 199, 215 (2014) (explaining correlation between unemployment and inability to afford private health care). Economic hardship and unemployment often prevent transgender people from affording private insurance or paying for health care. See *id.* at 218; see also JAMES ET AL., *supra* note 3, at 98 (positing cost barrier to healthcare access). One third of transgender respondents reported they did not seek medical care when necessary because of the expense. JAMES ET AL., *supra* note 3, at 98. Transgender people of color are more likely to be unable to see a provider because of the cost. *Id.*

43. See JAMES ET AL., *supra* note 3, at 94-95 (reporting transgender people less likely to have insurance than general population). Transgender people of color, such as Black, Native American, and Latinx, were most likely to be uninsured. *Id.* at 94. Overall, one in four transgender people experience issues with insurance coverage simply because of their transgender status, such as an insurer’s refusal to change a transgender person’s name and/or gender in their insurance records. See *id.* at 95. Thirteen percent of respondents reported insurance companies denying them coverage for routine healthcare procedures such as reproductive health screenings, prostate exams, and Papanicolaou (Pap) smears because those procedures are considered “gender specific” and inconsistent with their transgender identity. See *id.* Discrimination can manifest in the way the insurance coverage is designed and in the decisions insurers make when deciding whether to approve benefits and services. Kurzweil, *supra* note 42, at 226; see *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies [<https://perma.cc/3C2K-WMWC>] [hereinafter *Healthcare Laws*] (noting less than half of transgender population currently living in states with insurance discrimination protections).

44. See JAMES ET AL., *supra* note 3, at 95 (listing statistics of denials for transition-related treatment). Insurance companies denied coverage for transition surgery to over half of transgender respondents, and denied coverage for hormone therapy to one in four respondents. *Id.* Transition surgery and hormone therapy may be used to treat transgender individuals diagnosed with gender dysphoria. See WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF THE TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 5 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf [<https://perma.cc/V8M9-5P6Y>] (explaining treatment may alleviate

3. *Effect of Interpersonal and Systemic Discrimination on Transgender Health*

a. *Minority Stress Effect*

It is well established that societal stigma and discrimination can cause adverse health effects in marginalized populations.⁴⁵ Minority stress theory recognizes that people who belong to marginalized groups, such as transgender and gender-nonconforming people, may have worse overall health as a result of increased stress due to social stigma and prejudice.⁴⁶ Moreover, transgender and gender-nonconforming people who frequently face discrimination are more likely to engage in health-harming behaviors such as attempting suicide, abusing drugs and alcohol, and smoking.⁴⁷ This phenomenon is especially true for transgender people who belong to more than one disadvantaged group, such as transgender people of color, who face multiple forms of discrimination and thus are more likely to engage in health-harming behaviors and have worse overall health.⁴⁸ Unsurprisingly, the multiple forms of discrimination transgender people experience in employment, healthcare, and society negatively impact their overall health.⁴⁹

b. *Access to Routine Preventative Screenings and Gender-Affirming Care*

For a transgender patient, routine health-care screenings and treatment may require gender-incongruent care, which is the “medical treatment an individual’s

gender dysphoria). Gender dysphoria is the clinical diagnosis of “discomfort or distress” resulting from the “discrepancy between a person’s gender identity and that person’s sex assigned at birth (and the associated gender role and/or primary sex characteristics).” *Id.* Not all transgender or gender-nonconforming individuals experience gender dysphoria, however, and some transgender people do not seek gender-affirming treatment such as surgeries or hormone intervention. *Id.*

45. See Brandes, *supra* note 39, at 159 (explaining correlation between discrimination and negative health outcomes in sexual minorities).

46. See Heather A. McCabe & M. Killian Kinney, *LGBTQ+ Individuals, Health Inequities, and Policy Implications*, 52 CREIGHTON L. REV. 427, 444 (2019) (describing minority stress model and effect on mental and physical health). Minority stress can also occur in a transgender person who anticipates discrimination, conceals their transgender identity, or internalizes the negative messages surrounding transgender stigma. *See id.* at 445; *see also* Blake, *supra* note 38, at 200-01 (defining minority stress theory). Minority stress theory recognizes that members of marginalized groups in society experience excess stress because of their stigmatization. *See* Blake, *supra* note 38, at 200-01; WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 44, at 4 (explaining concept of minority stress theory in relation to transgender people). Minority stress is a socially based, chronic condition that may result in increased anxiety and depression among transgender people. *See* WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 44, at 4.

47. *See* Miller & Grollman, *supra* note 2, at 825 (elucidating relationship between discrimination and health-harming behaviors); *see also* JAMES ET AL., *supra* note 3, at 114-15 (discussing high instance of suicide and substance use among transgender community).

48. *See* Miller & Grollman, *supra* note 2, at 826 (explaining relationship between multiple forms of discrimination and likelihood of health-harming activity). Research also suggests that the more a person presents as gender-nonconforming—i.e., acting, dressing, talking, or presenting other behaviors inconsistent with gender stereotypes—the more likely they are to encounter discrimination and have worse overall health as a result. *See id.* at 827.

49. *See* JAMES ET AL., *supra* note 3, at 4-5 (concluding study outcomes show transgender people face severe discrimination impacting their physical and mental health).

physiology requires that does not match traditional notions regarding the care their gender needs.”⁵⁰ For example, a transgender man who has a cervix and uterus will require Pap smears to screen for cervical cancer.⁵¹ Although this procedure is considered medically necessary for a cisgender female, insurance providers will deny coverage for a transgender man whose insurance documents identify him as a male, even though he is still at risk for cervical cancer.⁵² Refusing to provide gender-incongruent care in the context of routine treatment can have fatal consequences; for example, the death of Robert Eads, a transgender man whose providers denied treatment for cervical and ovarian cancer until the cancer had metastasized beyond the point of recovery.⁵³

Transgender people with gender dysphoria may suffer mental health consequences when denied access to and insurance coverage for gender-affirming health care.⁵⁴ The American Medical Association (AMA), along with many other prominent medical associations, recognizes the medical necessity of

50. See Jordan Aiken, Article, *Promoting an Integrated Approach to Ensuring Access to Gender Incongruent Health Care*, 31 BERKELEY J. GENDER L. & JUST. 1, 4 (2016) (defining gender-incongruent care); see also Sofia Gruskin et al., “*In Transition: Ensuring the Sexual and Reproductive Health and Rights of Transgender Populations.*” A Roundtable Discussion, 26 REPROD. HEALTH MATTERS 21, 24 (2018) (arguing for comprehensive access to gender-affirming preventative and primary care). Gender affirmation is the process of being affirmed in one’s chosen gender identity or expression. See Gruskin et al., *supra*, at 24. There are four aspects of gender affirmation: “social (e.g. name, pronoun, dressing[]), psychological (e.g. internalized transphobia), medical (e.g. hormones, surgery), and legal (e.g. change of name and gender marker on identity documents).” *Id.* Although gender-affirming care is usually discussed in relation to transition-related services, in a broader sense, physician-patient care can be gender affirming when it “appropriately and respectfully attends to” the health needs of transgender patients. See *id.* Transgender patients should have access to both gender-affirming primary care, such as preventative screenings for mammograms and colonoscopies, and gender-affirming interventions, such as transition-related surgical procedures and hormone therapy. See *id.*

51. See Aiken, *supra* note 50, at 3 (offering example of transgender man’s need for preventative care for reproductive health).

52. See *id.* at 2-3 (discussing denial of transgender primary care because of gender markers on insurance forms). Similarly, transgender women are typically denied insurance coverage for prostate exams despite being at risk for prostate cancer. See *id.*; see also Blake, *supra* note 38, at 213-14 (examining insurance coverage disparities for routine and preventative services); JAMES ET AL., *supra* note 3, at 95 (relaying transgender patients’ issues obtaining insurance coverage and discussing lack of coverage for routine care); Kurzweil, *supra* note 42, at 226 (describing ways health insurance companies discriminate); *Healthcare Laws*, *supra* note 43 (noting many states lack health insurance discrimination protections).

53. See Aiken, *supra* note 50, at 4 (recounting death of Robert Eads, demonstrating tragic consequence of denying gender-incongruent care).

54. See AM. MED. ASS’N & GLMA: HEALTH PROS. ADVANCING LGBTQ EQUAL., ISSUE BRIEF: HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING CARE OF TRANSGENDER PATIENTS 3-4 (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf> [<https://perma.cc/2GGN-NKWU>] [hereinafter ISSUE BRIEF] (presenting correlation between lack of gender-affirming care and poor health). One meta-analysis found that transgender suicide rates dropped from 30% pre-gender-affirming treatment to 8% post-treatment. See *id.* at 4. Standards of care and services that affirm gender to treat gender dysphoria include mental health counseling, gender-affirming hormone therapy, and gender-affirming surgeries. *Id.* at 1. Transgender people with gender dysphoria but who have not undergone gender-affirming treatment are twice as likely to experience depression and four times as likely to suffer from anxiety than those who have undergone treatment. *Id.* at 4.

gender-affirming care to treat transgender patients with gender dysphoria.⁵⁵ Improving access to gender-affirming care leads to positive health outcomes for the transgender community, including a dramatic decrease in suicide attempts, depression, and anxiety.⁵⁶

c. Effect of Employment Discrimination and Economic Hardship on Transgender Health

Economic hardship and employment discrimination lead some transgender people to work in the underground economy at the expense of their health and well-being.⁵⁷ Sex work, for instance, increases a transgender person's exposure to sexual assault, rape, mental illness, and substance abuse.⁵⁸ Moreover, housing instability and high rates of homelessness adversely affect transgender people's overall health.⁵⁹

4. COVID-19's Impact on the Transgender Community

The novel Coronavirus, otherwise known as COVID-19, has impacted the health and economic stability of people across the world, especially people who belong to underserved populations.⁶⁰ COVID-19 has unique risk factors for transgender people because transgender people are more likely to have

55. *See id.* at 1 (asserting every major medical association recognizes necessity of gender-affirming care to improve transgender health); *see also* Gage, *supra* note 9, at 506 (listing medical organizations recognizing medical necessity of gender-affirming treatment). The AMA, the American Psychological Association (APA), and the World Health Organization (WHO) agree that extensive medical research demonstrates the medical necessity of gender-affirming care to treat gender dysphoria. *See* Gage, *supra* note 9, at 506.

56. *See* ISSUE BRIEF, *supra* note 54, at 4 (noting improved health among transgender patients following gender-affirming procedures); *see also* JAMES ET AL., *supra* note 3, at 107 (reporting decreased psychological distress in transgender people after transitioning). Psychological distress was higher among transgender individuals who had transitioned within the last year, as compared to those who had transitioned ten or more years prior. *See* JAMES ET AL., *supra* note 3, at 107. As expected, psychological distress was highest among transgender people who had not transitioned but wanted to. *See id.*

57. *See supra* notes 31-32 and accompanying text (discussing likelihood of transgender participation in underground economy resulting from multiple forms of discrimination).

58. *See* Halliwell, *supra* note 20, at 230-31 (reporting adverse health outcomes of sex work).

59. *See* JAMES ET AL., *supra* note 3, at 125 (concluding poor health outcomes due to housing instability); *see also* Alex S. Keuroghlian et al., *Out on the Street: A Public Health and Policy Agenda for Lesbian, Gay, Bisexual, and Transgender Youth Who Are Homeless*, 84 AM. J. ORTHOPSYCHIATRY 66, 66 (2014) (discussing relationship between homelessness and health risks for lesbian, gay, bisexual, transgender, queer (LGBTQ) youth). LGBTQ youth who experience homelessness have high rates of mental health and substance abuse issues, suicidal ideation, violence, and HIV risk behaviors. Keuroghlian et al., *supra*, at 66.

60. *See* JODY L. HERMAN & KATHRYN O'NEILL, UCLA SCH. L. WILLIAMS INST., VULNERABILITIES TO COVID-19 AMONG TRANSGENDER ADULTS IN THE U.S. 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf> [<https://perma.cc/ZA6D-V4TM>] (acknowledging severe impact of novel coronavirus). COVID-19 will likely have a greater impact on those who are already "economically and socially vulnerable." *Id.*; *see* Selena Simmons-Duffin, *Transgender Health Protections Reversed By Trump Administration*, NPR (June 12, 2020, 4:46 PM), <https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration> [<https://perma.cc/T5ZS-SWLT>] (noting African Americans more likely to die from COVID-19 than white Americans).

underlying health conditions, such as HIV/AIDS, asthma, and heart disease, which can result in serious health complications following a COVID-19 infection.⁶¹ Once infected, transgender people may have difficulty receiving adequate COVID-19 treatment because they are less likely to be insured or have access to consistent medical care, while being more likely to experience discrimination by health-care providers.⁶² COVID-19 also has a severe economic impact on the transgender community: Transgender people, particularly Black transgender women, face high rates of employment discrimination and homelessness under normal circumstances, and the pandemic will likely exacerbate the effects of these disparities, as many transgender people have lost their jobs due to the pandemic and those who are unhoused must live in congregate shelters at the risk of catching the virus.⁶³

B. The ACA

1. Purpose of the ACA: Expanding Access to Healthcare for All Americans

The ACA is the most expansive transformation of the U.S. healthcare landscape since the enactment of Medicaid and Medicare programs in the 1960s.⁶⁴ The ACA aimed to dramatically expand access to quality health insurance while lowering healthcare costs for consumers and providers.⁶⁵ The ACA sought to increase the number of insured Americans by expanding state Medicaid

61. See HERMAN & O'NEILL, *supra* note 60, at 1-2 (listing underlying conditions commonly found in transgender community); see also *How COVID-19 Impacts Sexual and Gender Minorities*, AM. PSYCH. ASS'N (June 29, 2020), <https://www.apa.org/topics/covid-19/sexual-gender-minorities> [<https://perma.cc/9CVV-C8KU>] (explaining transgender patients' increased risk of COVID-19 infection because of underlying conditions). The Centers for Disease Control and Prevention (CDC) stated that those who have underlying medical conditions are most vulnerable to a COVID-19 infection. See HERMAN & O'NEILL, *supra* note 60, at 1.

62. See Gonzales & Henning-Smith, *supra* note 5, at 739 (concluding transgender people more likely uninsured); JAMES ET AL., *supra* note 3, at 94-97 (listing transgender patients' negative experience with healthcare providers and insurers). Barriers transgender people face to accessing appropriate COVID-19 care include: a lack of respect by the physician, i.e. misgendering the patient or making insensitive remarks; medical mistrust by transgender patients due to previous harm and harassment; and lack of insurance coverage and ability to afford treatment. See *How COVID-19 Impacts Sexual and Gender Minorities*, *supra* note 61.

63. *How COVID-19 Impacts Sexual and Gender Minorities*, *supra* note 61 (noting many transgender people rely on "gig economy work" in industries affected by COVID-19). As a result of employment discrimination, transgender people are more likely to work in the underground economy, such as sex work, which has become even more unsafe during COVID-19. See *id.*; see also *supra* notes 31-32 and accompanying text (discussing likelihood of transgender participation in underground economy resulting from discrimination); HERMAN & O'NEILL, *supra* note 60, at 3 (describing COVID-19 risk for transgender people in congregate shelter setting).

64. See Kurzweil, *supra* note 42, at 202 (describing significance of ACA).

65. See Dana Holle, Note, *Health Is Health: Section 1557 of the Affordable Care Act and Transgender Healthcare Rights in Wisconsin and the United States*, 32 WIS. J.L., GENDER & SOC'Y 239, 243 (2017) (discussing goals of ACA); NAT'L CONF. OF STATE LEGISLATURES, THE AFFORDABLE CARE ACT: A BRIEF SUMMARY 1 (2011), <https://www.ncsl.org/portals/1/documents/health/HRACA.pdf> [<https://perma.cc/Q2HD-XNK8>] (listing legislative goals of ACA). The ACA also sought to improve disease prevention and wellness, improve healthcare quality and system performance, expand the healthcare workforce, and increase consumer protections. See NAT'L CONF. OF STATE LEGISLATURES, *supra*, at 1.

programs and creating an individual mandate, which initially required all uninsured individuals either to obtain health insurance or incur a payment penalty.⁶⁶ In 2016, two years after the ACA's most important coverage provisions took effect, nearly twenty million more people obtained health insurance than before the ACA's enactment, reducing the amount of uninsured Americans to a record low of 10%.⁶⁷

2. *The Text of Section 1557 and Its Impact on the U.S. Healthcare System*

The ACA's antidiscrimination provision, section 1557, prohibits health-care providers and insurers from discriminating against a patient "on the basis of sex" by incorporating Title IX's sex discrimination protections.⁶⁸ The provision provides that under the ACA, "an individual shall not, on the ground prohibited under . . . [T]itle IX of the Education Amendments of 1972 . . . be excluded from participation in . . . or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal finance assistance."⁶⁹ Any public or private healthcare entity or insurer receiving federal aid—including payments for Medicaid, the Children's Health Insurance Program, and Medicare—must comply with section 1557's antidiscrimination provision.⁷⁰ The

66. See Holle, *supra* note 65, at 243 (noting ACA's Medicaid expansion now covers those below 133% of federal poverty line); Arthur Nussbaum, Comment, *Can Congress Make You Buy Health Insurance? The Affordable Care Act, National Health Care Reform, and the Constitutionality of the Individual Mandate*, 50 DUQ. L. REV. 411, 414 (2012) (explaining individual mandate enforced via shared responsibility penalty); see also Mark A. Hall & Richard Lord, *Obamacare: What the Affordable Care Act Means for Patients and Physicians*, 349 BRITISH MED. J. 1, 3 (2014). The ACA was the United States' attempt at universal healthcare with its primary goal to make all Americans insurable. Hall & Lord, *supra*, at 3. To achieve this goal, the ACA expanded eligibility of state Medicaid programs to cover nearly every household close to the poverty line. See *id.* The ACA also sought to reform the market for individual insurance plans—i.e., insurance plans for those who do not have employer-sponsored coverage—as individual plans are typically the most costly with the least amount of coverage. See *id.* at 2. Notably, only 6% of the U.S. population had individual insurance coverage plans prior to the ACA's enactment. *Id.* The ACA's shared responsibility payment is a fine applicable to all individuals who do not maintain "minimum essential" health insurance coverage for themselves and their dependents. See Nussbaum, *supra*, at 414. The shared responsibility penalty is a fixed dollar amount; however, those who cannot afford coverage are penalized less based on their household income. See *id.*

67. See RACHEL GARFIELD ET AL., HENRY J. KAISER FAM. FOUND., *THE UNINSURED AND THE ACA: A PRIMER* 7 (2019), <http://files.kff.org/attachment/The-Uninsured-and-the-ACA-A-Primer-Key-Facts-about-Health-Insurance-and-the-Uninsured-amidst-Changes-to-the-Affordable-Care-Act> [https://perma.cc/98RH-EG7R] (discussing dramatic decrease of uninsured Americans between 2014 and 2016). Improvements in insurance coverage were most prominent among low-income communities and people of color. *Id.*

68. See *supra* note 10 and accompanying text (discussing section 1557's explicit incorporation of Title IX protections).

69. 42 U.S.C. § 18116.

70. See Sara Rosenbaum, *The Affordable Care Act and Civil Rights: The Challenge of Section 1557 of the Affordable Care Act*, 94 MILBANK Q. 464, 465 (2016) (describing breadth of section 1557); Kurzweil, *supra* note 42, at 226-27 (noting applicability of section 1557 to federal aid recipients). By incorporating Title VI and Title IX, federal civil rights laws now "permeate the entire U.S. health insurance system." Rosenbaum, *supra*, at 464; see Blake, *supra* note 38, at 222 (explaining novelty of civil rights protections in healthcare context); John E. Farmer, Jr., Note, *Charting the Middle Course: An Argument for Robust but Well-Tailored Health Care Discrimination Protection for the Transgender Community*, 52 GA. L. REV. 225, 230 (2017) (asserting section 1557

import of section 1557 is its ability to eliminate discrimination on the basis of sex, race, and national origin by both health-care providers and insurers, as nearly all healthcare and insurance entities receive some form of federal assistance or payment.⁷¹

3. *Enforcing Section 1557: The Obama Administration's HHS Regulation*

Section 1557 authorizes HHS to promulgate regulations to implement the section's antidiscrimination provisions.⁷² Under the Obama Administration, HHS's rule defined sex discrimination under the ACA to include discrimination on the basis of gender identity and sex stereotyping.⁷³ In turn, it defined "gender identity" as an individual's "internal sense of gender, which may be different from an individual's sex assigned at birth."⁷⁴ The rule described "sex stereotypes" as the societal notions of masculinity and femininity associated with the male and female genders, including the expectation that an individual will identify with only one gender and will conform to the traditional gender expressions—such as clothing, mannerisms, body characteristics, and hairstyles—typically associated with that gender.⁷⁵ In essence, the Obama-era regulation identified transgender status as a protected class within the context of the ACA.⁷⁶

Section 1557 also applies to the health insurance market such that an insurer may not deny a patient coverage "based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded" is different from the gender to which such services are typically available.⁷⁷ For example,

applies to "virtually every health care provider"). Any health programs or activities, including insurance providers, community health interventions, and employers that receive federal funding are subject to section 1557. *See* Kruzweil, *supra* note 42, at 226; Blake, *supra* note 38, at 223 (discussing applicability of section 1557 to entities receiving federal funds).

71. *See* Blake, *supra* note 38, at 223-24 (explaining broad application of section 1557 to federally-assisted entities). Insurers subject to section 1557 must comply with the section not just in their marketplace offerings, but also in any and all insurance products they provide, including third-party plans such as employer-insurance benefits. *See id.* at 223. Moreover, an insurer must comply with the provisions of section 1557 in its employee-benefit plan. *See id.* at 223-24.

72. *See* 42 U.S.C. § 18116(c) (providing regulation promulgation to implement discrimination provisions).

73. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,387 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (defining "on the basis of sex"). The regulation states that, under section 1557, discrimination "on the basis of sex" includes discrimination based on sex stereotyping and gender identity. *See id.*

74. *Id.* at 31,384 (defining gender identity).

75. *Id.* at 31,392 (defining sex stereotypes).

76. *See id.* at 31,388 (explaining section 1557's references to gender identity encompass transgender status); *see also* Aiken, *supra* note 50, at 13 (asserting gender identity protected class under ACA).

77. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,471-72 (prohibiting insurers from denying coverage on basis of transgender status or gender identity); *see* Blake, *supra* note 38, at 231-32 (discussing implications of section 1557 and Obama-era rule relating to health insurance coverage). Moreover, insurers are prohibited from implementing categorical exclusions for transition-related services. Blake, *supra* note 38, at 232. It is important to note, however, that these provisions do not affirmatively require insurers to cover transition-related care, and they do not prevent an insurer from evading coverage of those services if their transition policy is based on neutral standards that are applicable to all enrollees. *Id.* at 233.

insurance providers for transgender and gender-nonconforming individuals may not deny coverage for medically necessary services offered to other cisgender beneficiaries, such as Pap smears, mammograms, and prostate exams, regardless of whether the transgender patient's gender identity is consistent with those services.⁷⁸ Similarly, the regulations make clear that section 1557 reaches physician conduct by prohibiting health-care providers from declining to perform certain services on the basis of a patient's sex, regardless of whether the patient's gender identity aligns with their assigned sex, unless the provider has a nondiscriminatory reason for refusing.⁷⁹ Providers must offer services equally—such as a medically necessary hysterectomy—to both transgender and cisgender patients.⁸⁰

C. Section 1557 of the ACA and Antidiscrimination Protections in Title VII and Title IX

1. Obama-era Regulation's Reliance on Title VII

Because section 1557 explicitly incorporates Title IX's prohibition of discrimination "on the basis of sex"—and because courts use Title VII jurisprudence to interpret Title IX—President Obama's HHS relied on federal courts' interpretation of sex discrimination under Title VII when drafting the section 1557 regulation.⁸¹ During the regulation's notice-and-comment period, some commenters

78. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,456. OCR explains that, under this rule, an insurer cannot deny or limit coverage for any health service on the grounds that the individual's sex assigned at birth is different from "the one to which such services are ordinarily or exclusively available." *Id.* at 31,471; see Aiken, *supra* note 50, at 12 (acknowledging ACA mandates insurance coverage for gender-incongruent care); see also Peter Grieser, Note, *Administrative Contexts of Access to Gender-Confirmation Surgery*, 27 S. CAL. REV. L. & SOC. JUST. 165, 178 (2018) (requiring coverage for services regardless of consistency with patient's gender identity). An insurer subject to section 1557 and its implementing regulations may not limit coverage in a way that results in the discriminatory treatment of a transgender patient as compared to a cisgender patient. Grieser, *supra*, at 178.

79. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,427-28 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (prohibiting providers from denying or limiting services on basis of gender identity); see also Blake, *supra* note 38, at 227 (recognizing section 1557's ability to address provider conduct).

80. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,428 (noting providers may not deny transgender male medically necessary ovarian cancer treatment); Blake, *supra* note 38, at 227 (discussing requirements of health-care provider compliance with section 1557). For example, a gynecological surgeon whose previous policy was to decline performing a medically necessary hysterectomy to a transgender man would be required to revise that policy to offer that surgery equally to all individuals. See Blake, *supra* note 38, at 227-28. A provider need not change the services they currently offer, but they may not deny existing services to transgender patients on the basis of their gender identity. See *id.* at 227; see also Brief of Amici Curiae River City Gender Alliance and ACLU of Texas in Opposition to Plaintiffs' Motion for Preliminary Injunction at 4, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 16-CV-00108-O) (recognizing covered providers required to equally offer medically-necessary services).

81. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,388 (noting courts use Title VII jurisprudence to interpret sex discrimination under Title IX); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020) (noting Supreme Court uses Title VII to interpret Title IX due to similarities between acts); Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,168 (June 19, 2020) (to be codified at 45 C.F.R. pts. 86, 92, 147, 155, 156) (noting Supreme

criticized HHS's expansive definition of sex discrimination, arguing that HHS should limit this definition to discrimination against only the binary sexes.⁸² In response, OCR cited the holding of the seminal sex discrimination case, *Price Waterhouse v. Hopkins*,⁸³ which interprets Title VII's protections against sex discrimination to include not only the biological differences of sex but also discrimination based on sex stereotypes.⁸⁴

In *Price Waterhouse*, a female employee, Hopkins, brought a claim against her employer under Title VII alleging the employer had passed her up for a partnership opportunity because her mannerisms and demeanor did not conform to female stereotypes.⁸⁵ When the policy board explained to Hopkins why they declined to promote her, one board member suggested she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances for partnership.⁸⁶ In holding that the plaintiff had a viable claim, the Court declared that under Title VII, discrimination based on sex stereotypes constitutes discrimination on the basis of sex.⁸⁷ Relying on this holding, lower courts have since used the same theory of sex stereotyping under Title VII to prohibit discrimination of transgender people in the workplace.⁸⁸

Court interpretation of sex discrimination under Title VII impacts Title IX's interpretation); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,388 (discussing reliance on *Price Waterhouse* and Title VII cases in drafting regulation).

82. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,392 (noting criticisms of rule's inclusion of gender identity in defining sex discrimination); see also Derek Waller, Note, *Recognizing Transgender, Intersex, and Nonbinary People in Healthcare Antidiscrimination Law*, 103 MINN. L. REV. 467, 490 (2018) (relaying commenters' criticism of rule and agency's response). Commenters who opposed HHS's definition of sex discrimination argued that the inclusion of gender identity was contrary to Congress's intent to limit sex discrimination protections to the biological male and female sexes. Waller, *supra*, at 490.

83. 490 U.S. 228 (1989).

84. See *id.* at 251 (holding sex discrimination under Title VII includes sex stereotyping); see also Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,388 (pointing to *Price Waterhouse* holding in support of rule); Waller, *supra* note 82, at 490 (noting OCR pointed to *Price Waterhouse* and progeny to support its definition of sex discrimination); Elizabeth Sepper & Jessica L. Roberts, *Sex, Religion, and Politics, or the Future of Healthcare Antidiscrimination Law*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 217, 228 (2018) (articulating importance of *Price Waterhouse* holding relative to section 1557).

85. See *Price Waterhouse*, 490 U.S. at 231-32 (stating plaintiff's claim under Title VII).

86. See *id.* at 235 (listing partners' comments relating to sex stereotypes). During the plaintiff's evaluation for partnership, one partner suggested she "overcompensated for being a woman," while another described her personality as "macho." See *id.* One partner suggested the plaintiff should take "a course at charm school." See *id.*

87. See *id.* at 251 (holding employment decisions based on sex stereotypes constitutes impermissible sex discrimination under Title VII).

88. See *Kadel v. Folwell*, 446 F. Supp. 3d 1, 13 (M.D.N.C. 2020) (noting federal courts' reliance on *Price Waterhouse* to conclude transgender discrimination constitutes sex discrimination); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding termination of employee for gender transition constitutes sex discrimination under Title VII); accord *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); see also *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (concluding Gender Motivated Violence Act, and by association Title VII, prohibit transgender discrimination); *Toomey v. Arizona*, CV-19-00035-TUC (LAB), 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) (concluding discrimination based on transgender identity constitutes sex discrimination under Title VII); *EEOC v. A & E Tire*, 325 F. Supp. 3d 1129, 1135 (D. Colo. 2018) (holding sex

In *Bostock v. Clayton County*, the Supreme Court answered whether *Price Waterhouse*'s interpretation of sex discrimination applies to transgender people.⁸⁹ The case consolidated two discrete Title VII claims for sex discrimination: one alleging discrimination of a gay employee, Donald Zarda, and one alleging discrimination of a transgender employee, Aimee Stephens.⁹⁰ Relying on Title VII precedent, the Court opined that “an individual’s homosexuality or transgender status is not relevant to employment decisions” and that it is “impossible” to discriminate on these grounds without considering the employee’s sex.⁹¹ As such, firing an employee because of their transgender status constitutes discrimination “on the basis of sex” for the purposes of Title VII.⁹²

2. Section 1557’s Incorporation of Title IX’s Sex Discrimination Protections

Because section 1557 incorporates Title IX’s sex discrimination protections, courts must look to the interpretation of sex discrimination in Title IX cases to determine its meaning in the context of the ACA.⁹³ In *Whitaker ex rel. Whitaker*

discrimination under Title VII includes discrimination for gender nonconformance); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 756-57 (S.D. Ohio 2018) (affirming Title VII prohibits transgender discrimination on basis of sex); *U.S. EEOC v. Rent-a-Center E., Inc.*, 264 F. Supp. 3d 952, 956 (C.D. Ill. 2017) (determining logic of *Price Waterhouse* extends to Title VII claims for transgender discrimination); *Mickens v. Gen. Elec. Co.*, No. 16CV-00603, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016) (finding terminating transgender employee for transgender status impermissible sex stereotyping and discrimination under Title VII); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) (concluding *Price Waterhouse* and progeny prohibit sex stereotyping under Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (opining transgender discrimination “because of sex” violates Title VII); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (concluding transgender discrimination cognizable Title VII claim); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (holding transgender employee’s claim viable under Title VII because of sex stereotyping theory); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding *Price Waterhouse*’s prohibition of sex stereotyping encompasses transgender discrimination); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375 (SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (asserting sex stereotyping of transgender woman actionable under Title VII); *Waller, supra* note 82, at 482 (recognizing *Price Waterhouse* progeny under Title VII’s sex stereotyping theory).

89. See 140 S. Ct. 1731, 1737 (2020) (stating question presented).

90. See *id.* at 1737-38 (describing plaintiffs’ claims). In Stephens’ underlying case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit held that she had a viable Title VII claim for two reasons: first, it was “analytically impossible” to discharge an employee for being transgender without being motivated by the employee’s sex; and second, an employer cannot discriminate on the basis of transgender status without considering sex stereotypes and how they align with the individual’s gender identity. See 884 F.3d 560, 575, 576-77 (6th Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

91. *Bostock*, 140 S. Ct. at 1741.

92. See *id.* at 1743, 1754 (holding transgender discrimination violates Title VII).

93. See *supra* note 10 and accompanying text (discussing incorporation of Title IX into section 1557); *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health and Hum. Servs.*, No. 20-1630, 2020 WL 5232076, at *24 (D.D.C. Sept. 2, 2020) (noting interpretation of Title IX’s sex discrimination prohibitions impacts section 1557 interpretation); *Rumble v. Fairview Health Servs. (Rumble II)*, No. 14-CV-2037 (FLN), 2017 WL 401940, at *4 (D. Minn. Jan. 30, 2017) (recognizing claims for sex discrimination under section 1557 depend on interpretation of sex discrimination under Title IX); see also *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952 (D. Minn. 2018) (pointing to Title IX jurisprudence in support of conclusion that section 1557 prohibits transgender discrimination).

v. Kenosha Unified School District,⁹⁴ a transgender student brought a Title IX claim against his school board for its refusal to allow him to use the boys' bathroom in conformance with his gender identity.⁹⁵ The court rejected the school board's assertion that its policy was not based on sex stereotypes, noting that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."⁹⁶ The court explained that such a bathroom policy "punishes" the transgender student for their gender nonconformance, thus discriminating "on the basis of sex" and violating Title IX.⁹⁷ As in Title VII cases, federal courts have determined that discrimination based on an individual's transgender status—i.e., discriminating against someone because their gender identity is inconsistent with the stereotypes of their assigned sex—is prohibited discrimination "on the basis of sex" under Title IX.⁹⁸ Relying on this Title IX precedent, the Obama Administration's section 1557 regulation defined sex discrimination under the ACA to include discrimination on the basis of gender identity and sex stereotypes.⁹⁹

94. 858 F.3d 1034 (7th Cir. 2017).

95. *See id.* at 1039 (recounting Whitaker's Title IX claim against school board's unwritten bathroom policy). In setting up the facts of the case, the court described Whitaker as a "17 year-old high school senior who has what would seem like a simple request: to use the boys' restroom while at school." *Id.* at 1038-39. The student, Ashton, or "Ash" for short, was assigned female sex at birth but openly identifies and presents as a male and uses male pronouns. *See id.* at 1040. Title IX cases often concern a school board's refusal to allow a transgender student to use the bathroom associated with their gender expression because the student's gender expression is inconsistent with their assigned sex at birth. *See id.* at 1039 (recounting student's claim surrounding right to use bathroom in conformance with gender identity); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016) (noting plaintiff-student's claim stems from request to use bathroom matching her gender identity).

96. *See Whitaker*, 858 F.3d at 1048. The court also cited to *Glenn v. Brumby*, which held that sex stereotyping on the basis of an individual's transgender status violates the Equal Protection Clause. *See id.*; *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding transgender employee's firing violated Equal Protection Clause). The *Glenn* court concluded that the firing of a transgender employee violated the Equal Protection Clause because the employer based the firing on the employee's gender nonconformity and thus predicated on impermissible sex stereotyping. *Glenn*, 663 F.3d at 1320.

97. *See Whitaker*, 858 F.3d at 1049.

98. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1310 (11th Cir. 2020) (holding school bathroom policy violated transgender student's rights under Title IX); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020) (affirming district court ruling that transgender bathroom policy violated Title IX); *see also M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018) (stating discrimination claims based on "transgender status per se actionable under gender stereotyping theory"); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 327 (M.D. Pa. 2017) (recognizing prohibiting transgender student from using bathroom corresponding to gender identity violates Title IX).

99. *See Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376, 31,387 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (defining "on the basis of sex" used in section 1557); *see also Sepper & Roberts, supra* note 84, at 219 (discussing use of federal courts' interpretation of sex discrimination under Title IX); *Waller, supra* note 82, at 490 (positing gender identity constitutes protected class by citing to federal courts' interpretation of sex discrimination).

3. Federal Courts Interpreting the Language of Section 1557 Itself

Even without the Obama-era regulation defining sex discrimination, some federal courts have interpreted the language of section 1557 itself to protect transgender people because the text of section 1557 incorporates Title IX's prohibition of discrimination "on the basis of sex."¹⁰⁰ In interpreting section 1557's prohibition of sex discrimination, these courts also relied on Title VII and Title IX's construction of sex discrimination, which they concluded prohibits gender identity and sex stereotyping discrimination.¹⁰¹ Consistent with the Title VII and Title IX courts, the courts interpreting section 1557 determined that sex discrimination includes gender identity discrimination and sex stereotyping, such that section 1557 alone prohibits transgender discrimination.¹⁰²

D. Transgender Discrimination Under the Equal Protection Clause of the Fourteenth Amendment

Federal courts have also held that discrimination of transgender people violates the Equal Protection Clause on the basis of impermissible sex discrimination.¹⁰³ Using the Supreme Court's four-part test, federal courts in these cases

100. See *Kadel v. Folwell*, 446 F. Supp. 3d 1, 17 (M.D.N.C. 2020) (concluding transgender plaintiff's viable Title IX claim meant they also had claim under section 1557); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 957 (D. Minn. 2018) (concluding section 1557 prohibits gender identity discrimination solely on language of statute); see also *Prescott v. Rady Childs' Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017) (clarifying court's holding based on plain language of section 1557 and not HHS regulation); *Rumble v. Fairview Health Servs. (Rumble I)*, No. 14-CV-2037 (FLN), 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015) (finding for transgender plaintiff despite HHS not having yet created section 1557 regulation); *Waller*, *supra* note 82, at 495 (noting transgender litigant's favorable decision in *Rumble I* preceded promulgation of section 1557 regulation).

101. See *Tovar*, 342 F. Supp. 3d at 953 (finding Title IX and Title VII cases persuasive in determining transgender discrimination constitutes sex discrimination); see also *Prescott*, 265 F. Supp. 3d at 1099 (acknowledging transgender discrimination violates prohibition of sex discrimination under Title VII and Title IX).

102. See *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (holding Medicaid exclusion of transition treatment violates ACA and Title VII's sex discrimination prohibition); see also *Tovar*, 342 F. Supp. 3d at 953 (concluding sex discrimination under Title VII, Title IX, and section 1557 encompasses gender identity discrimination); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 950 (W.D. Wis. 2018) (describing Medicaid exclusion of transition services "text-book discrimination based on sex"); *Prescott*, 265 F. Supp. 3d at 1099 (interpreting ACA to include same protections against transgender discrimination under Title VII and Title IX).

103. See *Grimm*, 972 F.3d at 613, 616 (determining school district's transgender bathroom policy violates Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding discrimination of gender nonconformity constitutes sex-based discrimination under Equal Protection Clause); *Adams ex rel. Kasper*, 318 F. Supp. 3d at 1320 (explaining how bathroom policy violated transgender student's equal protection rights); see also *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1050, 1054 (7th Cir. 2017) (concluding transgender plaintiff states sufficient facts for equal protection claim); *Kadel*, 446 F. Supp. 3d at 18-19 (finding plaintiff states sufficient facts to support transgender discrimination violates Equal Protection Clause); *Flack*, 328 F. Supp. 3d at 953 (applying heightened scrutiny to Medicaid exclusion of transition surgery under Equal Protection Clause); *Doe v. Mass. Dep't of Corr.*, No. 17-12255, 2018 WL 2994403, at *11 (D. Mass. June 14, 2018) (denying motion to dismiss on equal protection claim asserting sex-based penal classification of transgender inmate); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (considering transgender people quasi-suspect class under Equal Protection Clause); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017)

found that transgender people are a suspect or quasi-suspect class under the Equal Protection Clause, thus mandating an intermediate scrutiny standard of review.¹⁰⁴ Based on this heightened scrutiny, and the government's inability to demonstrate that transgender classifications are substantially related to an important government interest, federal courts have used the Equal Protection Clause to protect transgender people from sex-based discrimination.¹⁰⁵

E. The Trump Administration's Attempt to Rollback Transgender Rights in Healthcare

1. Franciscan Alliance I and the Repeal of the Obama-era Regulation

Following the promulgation of the Obama-era regulation—which defined sex discrimination to include gender identity and sex stereotype discrimination—religiously affiliated health-care providers and eight states sought to enjoin the regulation on the grounds that sex discrimination claims under Title IX are reserved for discrimination of the biological sexes.¹⁰⁶ In *Franciscan Alliance I*, the judge, a “go-to judge” for conservative litigants, enjoined and later vacated the use of “gender identity” in the regulation’s definition of sex discrimination, holding that sex discrimination under Title IX only applies to discrimination of the binary sexes, and thus HHS’s definition including gender identity is impermissible.¹⁰⁷

(finding plaintiffs likely to succeed on equal protection claim arising from transgender military service ban); *Brown v. Dep’t of Health & Hum. Servs.*, 16CV569, 2017 WL 2414567, at *6 (D. Neb. June 2, 2017) (determining transgender plaintiff’s allegations sufficient to state equal protection claim); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288-89 (W.D. Pa. 2017) (holding transgender identity akin to sex in equal protection analysis); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015) (concluding transgender inmate’s denial of transition surgery adequately stated claim under Equal Protection Clause).

104. See *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (finding four-factor test demonstrated transgender student’s claim warranted heightened scrutiny). The *Highland* court set forth the inquiries of the four-part test, which ask whether the class: (1) has historically suffered discrimination, (2) has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,” (3) exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” (4) is a “minority or politically powerless.” See *id.* at 873 (citations omitted); see also *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) (concluding four-part test warrants treatment of transgender status as quasi-suspect class); *Flack*, 328 F. Supp. 3d at 952-53 (finding strong showing transgender population suspect class); *Barron*, 286 F. Supp. 3d at 1145 (citing “pervasive and extensive” similarities between transgender and gay people as suspect classes); *Stone*, 280 F. Supp. 3d at 768 (finding lower court’s application of four-part test warranted intermediate scrutiny of transgender individuals’ claim); *Evancho*, 237 F. Supp. 3d at 288 (applying four-part test revealed “all of the indicia” of class requiring intermediate scrutiny).

105. See *supra* note 103 (discussing federal courts jurisprudence holding transgender discrimination violates equal protection).

106. See *Franciscan Alliance I*, 227 F. Supp. 3d 660, 670, 686 (N.D. Tex. 2016) (summarizing healthcare provider’s claim).

107. See *id.* at 688 (concluding Title IX’s prohibition of sex discrimination only applies to binary sexes); see also *Franciscan Alliance II*, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019) (vacating impermissible portion of Obama Administration’s rule); Katie Keith, *Trump Administration Asks Court To Strike Down Entire ACA*, HEALTH AFFS.: FOLLOWING THE ACA (Mar. 26, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog.20190326.572950/full/> [https://perma.cc/ABE5-DGDV] (acknowledging *Franciscan Alliance I* judge declared entire ACA invalid); *Texas Judge Reed O’Connor is the ‘Go-To Judge’ for Conservatives*, *supra* note 14

Instead of appealing the decision, HHS, now under the Trump Administration, requested the court remand the issue to HHS so it could revise the rule.¹⁰⁸ In June of 2019, President Trump's HHS promulgated a new rule, which repeals the Obama-era definition of "on the basis of sex."¹⁰⁹ President Trump's rule repeals but does not replace the definition of sex discrimination; instead, the rule relies on the "plain meaning" of sex—the male and female binary—to dictate the scope of section 1557's sex discrimination protections.¹¹⁰ Two federal courts, however, have enjoined the Trump Administration's regulation on the grounds that its binary construction of sex discrimination is untenable in light of the Supreme Court's decision in *Bostock*.¹¹¹

2. Current Status of the ACA: The Tax Cut and Jobs Act of 2017 and *Texas v. United States*

As a cornerstone of his presidential campaign, President Trump promised to repeal and replace the ACA.¹¹² On the day of his inauguration, President Trump signed an executive order aimed at delaying implementation of the ACA, in

(acknowledging Judge O'Connor has sided with conservative positions in highly contentious cases). Judge O'Connor's court is a favorite among Republican state attorneys general and conservative policy groups. See *Texas Judge Reed O'Connor is the 'Go-To Judge' for Conservatives*, *supra* note 14.

108. See Waller, *supra* note 82, at 494-95 (explaining HHS request to stay proceeding to revise rule); see also *Washington v. U.S. Dep't of Health & Hum. Servs.*, No. C20-1105, 2020 WL 5095467, at *2 (W.D. Wash. Aug. 28, 2020) (explaining HHS's request to voluntarily remand rule for further consideration and revisions). HHS stated it needed time to consider the "reasonableness, necessity, and efficacy" of the 2016 rule. *Washington*, 2020 WL 5095467, at *2.

109. See *Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. 37,160, 37,178 (June 19, 2019) (to be codified at 45 C.F.R. pts. 86, 92, 147, 155, 156) (noting repeal of Obama-era rule defining sex discrimination).

110. See *id.* (declining to provide new definition of "on the basis of sex"). President Trump's HHS chose not to replace the Obama-era regulation with a new regulatory definition, and instead relies upon the "plain meaning of the term in the statute." *Id.* This plain meaning, it contends, refers to the "biological binary of male and female." *Id.*; see Simmons-Duffin, *supra* note 60 (explaining Trump rule one of many designed to exclude transgender people from sex discrimination protections).

111. See *Walker v. Azar*, No. 20-CV-2834 (SMG), 2020 WL 4749859, at *1 (E.D.N.Y. Aug. 17, 2020) (granting preliminary injunction of Trump sex discrimination rule in light of *Bostock*); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. 20-1630, 2020 WL 5232076, at *1 (D.D.C. Sept. 2, 2020) (issuing injunction to prevent repeal of Obama rule's "on the basis of sex" definition).

112. See *Trump's Campaign Promises - Has He Delivered on Them?*, BBC (Dec. 24, 2018), <https://www.bbc.com/news/world-us-canada-37982000> [<https://perma.cc/9SD6-AMQC>] (describing repeal of Obamacare constituting Trump's "trademark rally pledge"); Elizabeth Van Nostrand & Tina Batra Hershey, "I Walk In, Sign. I Don't Have to Go Through Congress." *President Trump's Use of Executive Orders to Unravel the Patient Protection and Affordable Care Act*, 12 ST. LOUIS U.J. HEALTH L. & POL'Y 169, 172 (2018) (discussing Trump Administration and Republican Party's desire to repeal and replace ACA). The "mantra" for the Trump Administration and the Republican Party is to repeal the ACA "very, very quickly." See Van Nostrand & Hershey, *supra*, at 172 (emphasizing Republican legislative priorities); cf. Aviva Aron-Dine, *Trump's Renewed Effort to Dismantle Obamacare Is Particularly Cruel During the Pandemic*, BUS. INSIDER (July 7, 2020, 10:28 AM), <https://www.businessinsider.com/trump-obamacare-affordable-care-act-covid-19-healthcare-pandemic-coronavirus-2020-7> [<https://perma.cc/48GM-45PC>] (noting continued efforts to repeal ACA without meaningful replacement).

hopes that Congress would soon repeal the Act in its entirety.¹¹³ When the legislation intended to dismantle the ACA failed in the Senate, the Trump Administration undertook a “piecemeal approach” to undo the Act.¹¹⁴ By the end of 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), which eliminates the ACA’s shared responsibility payment and reduced the penalty for not having insurance to \$0.¹¹⁵ Eliminating the shared responsibility payment, and in effect the individual mandate, opened the door for further challenges to the ACA in court.¹¹⁶

In *Texas v. United States*,¹¹⁷ twenty Republican state attorneys general and two individuals filed suit alleging that the passage of the TCJA and elimination of the shared responsibility penalty rendered the individual mandate of the ACA unconstitutional because it is no longer a permissible exercise of Congress’s taxing power.¹¹⁸ The plaintiffs challenged the validity of the ACA as a whole, arguing that the individual mandate is inseverable from the ACA, and without it, the entire ACA is untenable.¹¹⁹ The Trump Administration declined to defend the constitutionality of the ACA, directly reversing the Obama Administration’s

113. See Exec. Order No. 13,765, 82 Fed. Reg. 8351, 8351 (Jan. 20, 2017); see also Selena Simmons-Duffin, *Trump Is Trying Hard To Thwart Obamacare. How’s That Going?*, NPR (Oct. 14, 2019, 3:54 PM), <https://www.npr.org/sections/health-shots/2019/10/14/768731628/trump-is-trying-hard-to-thwart-obamacare-how’s-that-going> [<https://perma.cc/AWK8-ZA5Z>] (discussing President Trump’s executive order concerning implementation of ACA).

114. See Frank Harrison, *The Affordable Care Act: Where Are We Now?*, 65 FED. LAW. 33, 34 (2018) (discussing Trump Administration’s effort to dismantle ACA); Simmons-Duffin, *supra* note 113 (characterizing efforts to repeal ACA); Susan Davis & Domenico Montanaro, *McCain Votes No, Dealing Potential Death Blow To Republican Health Care Efforts*, NPR (Jul. 27, 2017, 11:46 PM), <https://www.npr.org/2017/07/27/539907467/senate-careens-toward-high-drama-midnight-health-care-vote> [<https://perma.cc/SQL4-4AXD>] (reporting Senate voted 51-49 against legislation repealing ACA); Van Nostrand & Hershey, *supra* note 112, at 180 (recounting Trump executive orders aimed at dismantling ACA). To chip away at the ACA, the Trump Administration cut funding for ACA advertising by 90%, and also cut funding for enrollment assistance by 41%. Harrison, *supra*, at 34. Moreover, the Congressional Budget Office estimated that the repeal of the individual mandate as part of the 2017 tax reform bill could increase the number of uninsured Americans by four million in 2019 and thirteen million in 2027. See *id.* Trump has issued three executive orders intended to curb the effectiveness of the ACA: Executive Order 13,765, which attacks the ACA’s individual mandate; Executive Order 13,798, which weakens the ACA’s preventive care mandate; and Executive Order 13,813, which encourages individuals to purchase insurance outside of the Health Insurance Marketplaces. See Exec. Order No. 13,765, 82 Fed. Reg. at 8351; Exec. Order No. 13,798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017); Exec. Order No. 13,813, 82 Fed. Reg. 48,385, 48,385 (Oct. 17, 2017); see also Van Nostrand & Hershey, *supra* note 112, at 180.

115. Pub. Law 115-97, 131 Stat. 2054 (2017); see Van Nostrand & Hershey, *supra* note 112, at 182 (discussing elimination of shared responsibility payment provision of ACA); see also Simmons-Duffin, *supra* note 113 (reporting ACA tax penalty \$0 after enactment of TCJA); *supra* note 66 and accompanying text (requiring uninsured individuals to either obtain insurance or pay penalty pursuant to ACA individual mandate).

116. See Simmons-Duffin, *supra* note 113 (recognizing TCJA opened new avenue to attack ACA).

117. 340 F. Supp. 3d 579 (N.D. Tex. 2018), *aff’d in part, vacated in part*, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom.* California v. Texas, 140 S. Ct. 1262 (2020).

118. See *id.* at 585, 591 (stating plaintiff class and plaintiffs’ claims concerning TCJA related to individual mandate of ACA); see also Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (holding individual mandate valid exercise of Congress taxing power).

119. See *Texas*, 340 F. Supp. 3d at 585 (recounting plaintiffs’ argument regarding constitutionality of ACA sans individual mandate).

position.¹²⁰ The district court agreed with the plaintiffs and held that, since the shared responsibility payment is \$0, the individual mandate no longer “triggers a tax” and therefore cannot be upheld as a valid exercise of Congress’s taxing power.¹²¹ Furthermore, the court found that the individual mandate is “‘essential to’ and ‘inseverable from’” the rest of the ACA, such that the remainder of the ACA is invalid.¹²² The Fifth Circuit agreed with the district court’s conclusion that, without the shared responsibility payment, the individual mandate no longer functions as a tax and is therefore unconstitutional, but it remanded the case to the district court to “employ a finer-toothed comb” on the issue of severability.¹²³ The Supreme Court has granted certiorari to decide the validity of the ACA sans individual mandate, and heard oral arguments in November of 2020.¹²⁴ If the Court ultimately agrees with the district court that the individual mandate is inseverable, the entire ACA will be invalidated, including section 1557’s antidiscrimination provision.¹²⁵

120. See Letter from Jeff Sessions, III, Att’y Gen., on Texas v. United States, No. 4:14-cv-00167-0 (N.D. Tex.) to Paul Ryan, Speaker of the House 1 (June 7, 2018), <https://www.justice.gov/file/1069806/download> [<https://perma.cc/SR8A-7BNX>]; see also Van Nostrand & Hershey, *supra* note 112, at 172 (noting Trump Administration’s brief stating it would not defend ACA).

121. See *Texas*, 340 F. Supp. 3d at 601.

122. See *id.* at 619.

123. See *Texas v. United States*, 945 F.3d 355, 369, 393, 402 (5th Cir. 2019) (concluding without shared responsibility payment individual mandate unconstitutional “command”), *cert. granted sub nom.* *California v. Texas*, 140 S. Ct. 1262 (2020).

124. See *California v. Texas*, 140 S. Ct. 1262 (2020) (mem.); Transcript of Oral Argument at 1, *California*, 140 S. Ct. 1262 (Nos. 19-840, 19-1019) (noting date of oral argument); Julie Rovner, *The Future of the Affordable Care Act in a Supreme Court Without Ginsburg*, NPR (Sept. 21, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/09/21/915000375/the-future-of-the-affordable-care-act-in-a-supreme-court-without-ginsburg> [<https://perma.cc/36QB-WJYU>] (discussing Republican-led effort to invalidate ACA in courts). Instead of waiting for Judge O’Connor to reconsider the severability of the individual mandate from the ACA following the Fifth Circuit’s remand, the Democratic attorneys general defending the ACA petitioned the Court to hear the case during its 2020 term. See Rover, *supra*.

125. See *Texas v. United States*, 340 F. Supp. 3d 579, 619 (N.D. Tex. 2018) (concluding other ACA provisions invalid in light of finding individual mandate inseverable), *aff’d in part, vacated in part*, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom.* *California v. Texas*, 140 S. Ct. 1262 (2020); see also Katie Keith, *ACA Round-Up: Texas Oral Argument, RADV Report, And More*, HEALTH AFFS.: FOLLOWING THE ACA (Aug. 20, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200820.694139/full/> [<https://perma.cc/42BK-NXJE>] [hereinafter Keith, *ACA Round-Up*] (noting Court to hear oral arguments November 2020 and describing arguments and potential holdings); Katie Keith, *After Justice Ginsburg’s Loss, What A New Court Could Mean For The ACA*, HEALTH AFFS.: FOLLOWING THE ACA (Sept. 20, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200920.954961/full/> [<https://perma.cc/8YXU-MNK6>] [hereinafter Keith, *After Justice Ginsburg’s Loss*] (considering what Justice Ginsburg’s loss means for ACA case).

III. ANALYSIS

A. *Transgender Patients Need Federal Protections in Healthcare*

The vulnerable position of transgender people warrants federal protection.¹²⁶ Despite section 1557 of the ACA and *Bostock*'s interpretation of Title VII, transgender people still lack sufficient federal protection from sex- and gender-based discrimination.¹²⁷ Additionally, many states do not have statutory protections for transgender people, and those that do vary in scope and may be inconsistent with other state protections.¹²⁸ The lack of federal laws addressing transgender discrimination results in a "patchwork" of civil rights protections, where some states recognize transgender discrimination while others do not.¹²⁹ As such, transgender people are subject to discrimination in many areas of their lives, including employment, housing, and healthcare, and have few avenues of recourse.¹³⁰

These multiple forms of discrimination result in significant mental and physical health consequences in the transgender community.¹³¹ As recognized by

126. See *supra* note 104 and accompanying text (discussing transgender status constitutes suspect class subject to intermediate scrutiny); see also *supra* note 39 (noting relationship between provider discrimination and adverse health outcomes); *supra* note 40 (recognizing common barriers transgender patients face in healthcare).

127. See Blake, *supra* note 38, at 227 (stating transgender patients "at the mercy" of state law with respect to discrimination in healthcare); Adams et al., *supra* note 8, at 481 (noting lack of federal protections for transgender people); see also MOVEMENT ADVANCEMENT PROJECT, *supra* note 2, at 6 (calling LGBTQ rights in United States "puzzling and frustrating patchwork of legal protections from state to state").

128. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 2, at 4-6 (noting variance among state laws protecting transgender people). The Movement Advancement Project examines LGBTQ-related state laws and scores each state based on the comprehensiveness of their antidiscrimination protections. See *id.* at 2. The Movement Advancement Project report evaluates LGBTQ protections in areas such as health care, criminal justice, identity documents, antidiscrimination, and relationship and paternal recognition. *Id.* Nineteen states have high or medium scores, and five states have fair scores. *Id.* at 4. Over half of the United States has low or negative overall LGBTQ policy scores. *Id.* There are currently more state protections for gay people than transgender people, which demonstrates the uneven progression of LGBTQ rights across America. See *id.* at 6.

129. See Adams et al., *supra* note 8, at 481 (positing battle for transgender rights happens at state level); *Healthcare Laws*, *supra* note 43 (noting inconsistent healthcare and insurance protections for transgender people across United States). Only 42% of the LGBTQ population lives in a state with insurance discrimination protections for gender identity, while only 54% live in states with Medicaid coverage for gender-transition services. *Healthcare Laws*, *supra* note 43.

130. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 2, at 12 (discussing disparities among state healthcare antidiscrimination laws and increase in state protections generally); see also *supra* notes 26-28 and accompanying text (recognizing employment discrimination and disparities among transgender people); *supra* notes 31-32 and accompanying text (concluding employment discrimination leads some transgender people to work in underground economy); *supra* notes 34-35 and accompanying text (noting housing discrimination, homelessness, and poverty rates in transgender community); *supra* notes 42-43 and accompanying text (offering cost, unemployment, discriminatory insurance and provider practices constitute barriers to healthcare); *How COVID-19 Impacts Sexual and Gender Minorities*, *supra* note 61 (noting transgender community has higher rates of job insecurity and discrimination). Only twenty states have explicit antidiscrimination protections for transgender people in employment, housing, and public accommodations. MOVEMENT ADVANCEMENT PROJECT, *supra* note 2, at 12.

131. See *supra* note 6 and accompanying text (discussing severe mental health consequences of transgender discrimination); *supra* note 49 and accompanying text (recognizing multiple forms of discrimination result in

minority stress theory, transgender people suffer worse overall health as a result of societal and systemic discrimination.¹³² Because discrimination causes poor health, federal laws ensuring transgender people equal access to healthcare services are necessary in order to remedy these stigma-created health disparities.¹³³ Equal access to healthcare services has become even more crucial for the transgender population in the midst of an ongoing, international pandemic.¹³⁴

B. Section 1557 of the ACA Protects Transgender Patients, Regardless of President Trump’s Repeal of the Obama-Era Regulation

1. The ACA’s Incorporation of Sex Discrimination Under Title IX—and by Extension, Title VII—Means that Section 1557 Also Prohibits Transgender Discrimination

The ACA’s antidiscrimination provision, section 1557, prohibits transgender discrimination because sex discrimination under Title VII, and likely Title IX, includes discrimination based on transgender status.¹³⁵ Section 1557 explicitly incorporates Title IX’s sex discrimination protections, which means that any sex discrimination protections found under Title IX also apply in the context of the ACA.¹³⁶ When interpreting sex discrimination under Title IX, courts often look to the interpretation of sex discrimination under Title VII, such that Title VII’s

worse health for transgender community); *supra* notes 52-53 (warning fatal consequences result of discriminatorily denying transgender patients preventative care insurance coverage); *supra* text accompanying notes 31-32 (noting some transgender people work in underground economy because of employment discrimination); *supra* notes 31-32, 58 and accompanying text (acknowledging possible health consequences of working in underground economy result of transgender employment discrimination); *supra* note 59 and accompanying text (concluding poor health outcomes result from transgender housing discrimination); *see also How COVID-19 Impacts Sexual and Gender Minorities*, *supra* note 61 (asserting transgender people have worse overall health resulting from both systemic and interpersonal discrimination).

132. *See supra* notes 46-48 and accompanying text (recognizing minority stress theory for understanding effect of discrimination on transgender health).

133. *See Blake*, *supra* note 38, at 234 (discussing need for healthcare access to remedy effects of stigma); *see also* MOVEMENT ADVANCEMENT PROJECT, *supra* note 2, at 13 (suggesting improving transgender health disparities requires antidiscrimination laws in healthcare).

134. *See supra* notes 61-62 and accompanying text (discussing risk factors and barriers to healthcare access for transgender people during COVID-19).

135. *See supra* note 92 and accompanying text (noting Supreme Court held in *Bostock* transgender discrimination violates Title VII); *supra* note 98 and accompanying text (listing Title IX jurisprudence finding transgender discrimination constitutes sex discrimination); *see also* *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-1630, 2020 WL 5232076, at *24 (D.D.C. Sept. 2, 2020) (noting Title VII principles impact both Title IX and section 1557).

136. *See supra* note 10 and accompanying text (discussing section 1557’s explicit incorporation of Title IX sex discrimination); *see also Rumble II*, No. 14-CV-2037 (FLN), 2017 WL 401940, at *4 (D. Minn. Jan. 30, 2017) (recognizing sex discrimination claims under section 1557 depend on interpretation of sex discrimination under Title IX); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952 (D. Minn. 2018) (pointing to Title IX jurisprudence in support of concluding section 1557 prohibits transgender discrimination).

interpretation of sex discrimination—via its relationship with Title IX—also informs section 1557’s prohibition of sex discrimination.¹³⁷

Over thirty years ago, the Supreme Court recognized sex stereotyping as a form of impermissible sex discrimination under Title VII in *Price Waterhouse*.¹³⁸ Critically, the Court reasoned that an employer who discriminates against an employee because she does not conform to female stereotypes “has acted on the basis of gender” for the purposes of Title VII.¹³⁹ *Bostock* built upon the principle *Price Waterhouse* first announced and confirmed its application to the transgender community: An employer who fires a transgender woman (whose sex assigned at birth was male) while retaining an “otherwise identical” female-presenting employee (whose sex assigned at birth was female) discriminates against the transgender woman “for traits or actions that it tolerates in an employee identified as female at birth.”¹⁴⁰ Therefore, *Bostock* merely solidifies what the Title VII courts have concluded for years: Transgender discrimination is sex discrimination.¹⁴¹

The Court’s momentous holding in *Bostock* must inform our understanding of sex discrimination in other federal laws, including Title IX and section 1557.¹⁴² Relying on Title VII precedent, federal courts have routinely found causes of action under Title IX for transgender students.¹⁴³ In these cases, courts have historically employed an almost identical reasoning to the *Bostock* Court: A school bathroom policy singling out only the transgender student violates Title IX because the policy necessarily considers the student’s assigned sex at birth and their

137. See *supra* note 81 and accompanying text (noting federal courts’ reliance on Title VII to interpret Title IX); see also *Whitman-Walker*, 2020 WL 5232076, at *24 (noting Title VII jurisprudence has clear impact on Title IX and by extension, section 1557).

138. See *supra* note 87 (recounting Court’s holding of impermissible sex stereotyping under Title VII in *Price Waterhouse*).

139. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

140. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020); cf. *Price Waterhouse*, 490 U.S. at 250 (holding sex stereotyping constitutes impermissible sex discrimination).

141. See *Bostock*, 140 S. Ct. at 1743, 1754. The *Bostock* Court explained that when an employer discriminates against employees for being gay or transgender, the employer “must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms—and that ‘should be the end of the analysis.’” *Id.* (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 135 (2d Cir. 2018) (Cabranes, J., concurring in judgment)); see *supra* note 88 (describing Title VII courts’ interpretation of sex discrimination to include transgender discrimination); *supra* note 98 and accompanying text (noting Title IX courts’ interpretation of sex discrimination).

142. See *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-1630, 2020 WL 5232076, at *24 (D.D.C. Sept. 2, 2020) (noting *Bostock* reasoning not limited to Title VII cases). The *Whitman-Walker* court recognized that *Bostock*’s principles “plainly have implications for Title IX’s prohibition on sex discrimination and, by extension, Section 1557.” *Id.* The court went on to state that *Bostock* has “clear import for the meaning of discrimination based on sex under Title IX.” *Id.* at *25; see *Walker v. Azar*, No. 20-CV-2834 (SMG), 2020 WL 4749859, at *9 (E.D.N.Y. Aug. 17, 2020) (noting HHS itself recognizes *Bostock* impacts interpretation of sex discrimination under Title IX and section 1557); see also *supra* note 81 (discussing federal courts’ reliance on Title VII when interpreting Title IX).

143. See *supra* note 98 and accompanying text (explaining, like Title VII, courts have interpreted Title IX sex discrimination to include transgender discrimination).

transgender identity's incongruence with that assigned sex.¹⁴⁴ Accordingly, because section 1557 explicitly incorporates the sex discrimination protections of Title IX—which protections are informed by Title VII and its prohibition of transgender discrimination as sex discrimination—it follows that section 1557 prohibits transgender discrimination “on the basis of sex.”¹⁴⁵

2. *Even Without the Obama-Era Regulation Defining Sex Discrimination, Section 1557 Protects Transgender People Based on Title VII and Title IX*

Although the Trump Administration attempted to limit the scope of section 1557 by repealing the Obama-era definition of sex discrimination, section 1557 protects transgender people regardless of the regulatory definition of sex discrimination because of the Supreme Court's holding in *Bostock* and its impact on Title IX and section 1557.¹⁴⁶ In repealing the Obama-era regulation, the Trump Administration itself acknowledged the impact a Title VII ruling would have on Title IX—and by implication section 1557—when it stated that “a holding by the U.S. Supreme Court on the meaning of ‘on the basis of sex’ will likely have ramifications for the definition of ‘on the basis of sex’ under Title IX.”¹⁴⁷ *Bostock*'s holding does impact our understanding of sex discrimination under Title IX—and by extension section 1557—because the Court affirmed that sex discrimination includes not only the biological differences between male and female

144. See *Whitman-Walker*, 2020 WL 5232076, at *23 (noting transgender discrimination “cannot be meaningfully separated” from sex discrimination based on sex stereotypes); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (holding transgender bathroom policy “punishes” transgender student for nonconformance with stereotypes of their assigned sex); cf. *Bostock*, 140 S. Ct. at 1741 (explaining transgender discrimination “penalizes” transgender employee for traits it tolerates in other employees).

145. See *Whitman-Walker*, 2020 WL 5232076, at *24 (determining *Bostock* reasoning applies to both Title IX and section 1557); Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,168 (June 19, 2020) (to be codified at 45 C.F.R. pts. 86, 92, 147, 155, 156) (noting Title VII interpretation of sex discrimination impacts Title IX and section 1557 by extension); see also *Walker*, 2020 WL 4749859, at *9 (calling *Bostock* “important aspect” of deciding Title IX and section 1557 prohibit transgender discrimination); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (acknowledging after *Bostock*, court had “little difficulty” in determining transgender bathroom policy violates Title IX); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020) (noting Supreme Court uses Title VII to interpret Title IX due to similarities between acts).

146. See *supra* notes 81, 145 (discussing impact of *Bostock* decision on Title IX and section 1557); see also *supra* note 110 (acknowledging Trump Administration's attempt to exclude transgender people from ACA via section 1557 rule repeal).

147. See Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. at 37,168. The Trump Administration went on to note that “Title VII case law has often informed Title IX case law with respect to the meaning of discrimination ‘on the basis of sex.’” *Id.* Despite recognizing the clear impact a Title VII ruling would have on section 1557, the Trump Administration “plowed ahead” in repealing the Obama-era rule “without even pausing to consider the Court's decision [in *Bostock*].” *Whitman-Walker*, 2020 WL 5232076, at *25. The timing of the Trump Administration's rule “might even suggest to a cynic that the agency pushed ahead specifically to avoid having to address an adverse decision.” *Id.* at *9 (finding Trump rule revision likely supports arbitrary and capricious claim in light of *Bostock* decision).

but also the failure to conform to the gender binary—i.e., being transgender.¹⁴⁸ Put another way, *Bostock* confirmed that transgender discrimination is discrimination “on the basis of sex” because transgender people, by definition, do not conform to the stereotypes associated with their assigned sex; therefore, discriminating against a person’s transgender status *necessarily requires* considering the transgender person’s assigned sex and its incongruence with their expression of gender, i.e., their transgender status.¹⁴⁹ The Trump Administration’s attempt to exclude transgender people from section 1557 fails because even under a binary understanding of sex, transgender discrimination constitutes sex discrimination for failing to conform to that binary.¹⁵⁰ Consequently, even without the Obama-era rule defining “on the basis of sex” to include transgender discrimination, transgender people still have a cause of action under section 1557 alone because Title VII’s recognition of transgender discrimination as sex discrimination strongly suggests Title IX and section 1557 afford this protection as well.¹⁵¹

148. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020) (concluding transgender discrimination “requires an employer” to treat individuals different because of their sex); *Walker v. Azar*, No. 20-CV-2834 (SMG), 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020) (granting preliminary injunction of Trump section 1557 rule in light of *Bostock*); see also *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-1630, 2020 WL 5232076, at *45 (D.D.C. Sept. 2, 2020) (issuing injunction based on *Bostock* to prevent President Trump repeal of Obama-era section 1557 rule).

149. See *Bostock*, 140 S. Ct. at 1741-42 (explaining transgender discrimination punishes transgender person for traits tolerated in cisgender people); *Whitman-Walker*, 2020 WL 5232076, at *23 (noting cannot meaningfully divorce “gender identity” from discrimination based on sex stereotyping); see also *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (explaining by definition, transgender people “transgress gender stereotypes”); *Toomey v. Arizona*, CV-19-00035-TUC (LAB), 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) (finding Medicaid coverage exclusion for gender reassignment surgery supports Title VII claim). The exclusion, the court found, is “directly connected” to the incongruence between the transgender litigant’s sex assigned at birth and his gender identity. *Toomey*, 2019 WL 7172144, at *6. Discrimination because a person does not express gender in a way that is consistent with their sex “implicates the gender stereotyping prohibited by Title VII.” *Id.*; see *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018) (acknowledging holding based on *Price Waterhouse*’s prohibition of sex stereotyping under Title VII), *aff’d sub nom. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). The court held that because the transgender employee intended to dress like a woman and was “no longer going to represent himself as a man,” her claim fell squarely within the purview of sex-based discrimination that *Price Waterhouse* forbids. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 572.

150. See *supra* note 149 and accompanying text (arguing sex discrimination includes failure to conform to sex binary); see also *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526-27 (D. Conn. 2016) (noting sex discrimination includes differences between genders). Discrimination on the basis of sex is not limited to discrimination on the basis of “maleness” and “femaleness,” but also “discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which an individual may be classified as male or female.” *Fabian*, 172 F. Supp. 3d at 526.

151. See *Whitman-Walker*, 2020 WL 5232076, at *24 (explaining *Bostock* reasoning and conclusion extends to other sex discrimination laws); *supra* note 145 and accompanying text (acknowledging interrelatedness of sex discrimination interpretation under Title VII, Title IX, and section 1557); see also *supra* note 81 and accompanying text (acknowledging President Obama HHS’s reliance on Title IX, Title VII cases in drafting section 1557); *supra* notes 100-02 and accompanying text (identifying federal courts have found language of section 1557 alone protects transgender people).

3. *The Equal Protection Clause Provides an Alternative Basis for Transgender Protection in the Healthcare Space*

The Equal Protection Clause of the Fourteenth Amendment also prohibits transgender discrimination in healthcare, and, therefore, should provide transgender patients protection under the ACA, even with Trump's repeal of the Obama-era rule.¹⁵² Several federal courts recognize that sex discrimination under the Equal Protection Clause includes discrimination on the basis of gender stereotypes.¹⁵³ Given that "all people, whether transgender or not, are protected from discrimination on the basis of gender stereotype," the Trump Administration cannot exclude these protections' application to the transgender population.¹⁵⁴

Equal protection claims alleging sex-based discrimination should be subject to intermediate scrutiny because sex and gender constitute a suspect class.¹⁵⁵ When determining whether intermediate scrutiny is appropriate for a litigant's equal protection claim, a court conducts a four-part inquiry examining whether the class has been historically "subjected to discrimination"; the class has a defining characteristic that does not affect their ability to contribute to society; whether the class has an "obvious, immutable, or distinguishing characteristic" specific to their group; and whether the group is a "minority or politically powerless."¹⁵⁶ Taking each inquiry in turn, the transgender class easily satisfies the four-part test to warrant intermediate scrutiny as a suspect class.¹⁵⁷ Transgender people have been historically discriminated against, and still are discriminated

152. See *supra* note 103 and accompanying text (discussing federal jurisprudence finding Equal Protection Clause may prohibit transgender discrimination).

153. See *Glenn*, 663 F.3d at 1317; see also *supra* note 103 and accompanying text (outlining federal cases considering transgender discrimination under Equal Protection Clause).

154. See *Glenn*, 663 F.3d at 1318. The *Glenn* court went on to explain that no person may be discriminated against because of their perceived gender nonconformity, and because these protections apply to everyone, they cannot be denied to transgender people under the Equal Protection Clause. See *id.* at 1319.

155. See *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (noting governmental acts based on sex discrimination subject to heightened scrutiny). The *Glenn* court opined that the Supreme Court's use of heightened scrutiny in sex-based claims is to eliminate discrimination on the basis of gender stereotypes. See *id.* at 1318-19.

156. See *supra* note 104 and accompanying text (explaining Supreme Court's use of four-part test and its application to transgender equal protection claims).

157. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) (engaging with four-part test confirms transgender people constitute "quasi-suspect class"); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018) (conducting four-part test reveals transgender discrimination subject to heightened scrutiny); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (finding transgender people bear all relevant characteristics of quasi-suspect class); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (adopting lower court's application of four-part test classifying transgender people suspect class); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (finding "all of the indicia" necessary for application of intermediate scrutiny); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 854, 874 (S.D. Ohio 2016) (finding heightened scrutiny appropriate for transgender discrimination claim under four-factor test).

against, as evidenced by their unequal access to healthcare and high unemployment rates resulting from workplace discrimination.¹⁵⁸ Transgender people also face significant housing discrimination, and are three times as likely to be homeless than a cisgender person.¹⁵⁹ Most relevant to this Note, transgender people often experience discrimination in healthcare by both insurers and providers.¹⁶⁰ A transgender person's defining characteristic—gender nonconformity—bears no relationship to their ability to contribute to society.¹⁶¹ Moreover, the transgender community's nonconformance with gender stereotypes constitutes a “distinguishing characteristic” specific to transgender people.¹⁶² Finally, transgender people are, arguably, one of the most disfavored and politically-powerless minorities in American society—especially transgender individuals whose identities intersect with another disfavored group, such as transgender people of color.¹⁶³ As the court in *Flack* suggested, one would be “hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny” under the Equal Protection Clause.¹⁶⁴ Consequently, if discrimination based on transgender status is a “form of sex-based discrimination” under the Equal Protection Clause, it should also constitute sex discrimination under section 1557.¹⁶⁵

158. See *supra* notes 26-28 and accompanying text (discussing high unemployment rate resulting from transgender discrimination); see also *supra* notes 42-43 and accompanying text (offering cost, unemployment, discriminatory insurance and provider practices creating barriers to health care); *Grimm*, 972 F.3d at 611-12 (discussing various forms of transgender discrimination in employment, housing, and military service).

159. See *supra* note 34 (reporting transgender people more likely to encounter housing instability); see also *Grimm*, 972 F.3d at 612 (recognizing transgender people more likely to experience homelessness).

160. See *supra* note 38 and accompanying text (recounting physician-patient discrimination in healthcare); see also *supra* note 43 and accompanying text (explaining barriers to insurance coverage for transgender people).

161. See *Grimm*, 972 F.3d at 612 (providing seventeen leading medical associations agree transgender status bears no relation to societal contribution); *Evancho*, 237 F. Supp. 3d at 287 (concluding transgender status “defining characteristic” does not affect productivity in society); *Barron*, 286 F. Supp. 3d at 1145 (explaining transgender status “bears no relation to ability to perform or contribute to society”); *Bd. of Educ. of the Highland Loc. Sch. Dist.*, 208 F. Supp. 3d at 874 (asserting “obviously” no relationship between transgender status and ability to contribute to society).

162. See *Grimm*, 972 F.3d at 612-13 (stating transgender status “is as natural and immutable as being cisgender”); see also *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 714, 719 (D. Md. 2018) (noting transgender people “by definition” transgress gender stereotypes).

163. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020) (acknowledging lack of transgender representation in government and holding transgender people constitute politically-powerless minority); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (discussing political powerlessness of transgender people); see also *supra* note 27 and accompanying text (noting transgender people of color face higher unemployment rates than white transgender people); *supra* note 48 and accompanying text (concluding transgender minorities face multiple forms of discrimination resulting in worse health).

164. *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018).

165. See *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (concluding transgender discrimination constitutes sex-based discrimination); see also *Grimm*, 972 F.3d at 613, 616 (concluding transgender discrimination offends Equal Protection Clause).

IV. CONCLUSION

The transgender and gender nonconforming communities endure societal and systemic discrimination that negatively impact their health and well-being. This is especially true for transgender people who belong to more than one marginalized group, such as transgender people of color, who suffer the socioeconomic and health consequences of multiple forms of discrimination. The ACA sought to increase access to quality and affordable health care for all Americans and made strides to reach that goal, as evidenced by the nearly twenty million newly-insured Americans who gained coverage under the ACA.

Congress intentionally drafted the ACA's antidiscrimination provision, section 1557, to eradicate discrimination in healthcare—including discrimination of transgender people on the basis of sex. This is evidenced by section 1557's incorporation of Title IX—and by association Title VII—and the definition of sex discrimination in cases interpreting these Titles, which increasingly include the discrimination of transgender identity. The Supreme Court's recent decision in *Bostock*, holding Title VII does protect transgender people from discrimination, further supports the conclusion that section 1557 protects transgender people because it incorporates the protections of Title IX, which protections are interpreted using Title VII jurisprudence. Furthermore, the trend in case law to treat transgender status as a suspect class under the Equal Protection Clause also demonstrates that section 1557 prohibits transgender discrimination on the basis of sex. To suggest otherwise would lead to the absurd conclusion that a transgender patient could sue a public healthcare entity for sex discrimination under the Equal Protection Clause but not under the ACA. Federal court jurisprudence interpreting sex discrimination under Title VII, Title IX, and the Equal Protection Clause in favor of transgender litigants warrants the conclusion that section 1557 protects them as well.

The Obama-era rule defining sex discrimination under section 1557, which was modeled after Title VII jurisprudence, reflects the intent to prohibit transgender discrimination under the ACA. Nevertheless, HHS, acting under the Trump Administration, promulgated a new rule attempting to rollback these protections. The Trump Administration's attempt to exclude transgender people from section 1557 is especially cruel given that it comes during the COVID-19 pandemic when transgender people—more than ever—need access to healthcare. Fortunately, the abundance of case law interpreting federal sex discrimination laws to protect transgender people supports the conclusion that section 1557 protects them as well, despite President Trump's attempt to exclude the transgender community from these protections.

Despite the accomplishments of the ACA in initially reducing the number of uninsured Americans, it has been the subject of repeated attacks by the Trump Administration via serial rulemaking and also by Congress in passing the TCJA in 2017 and eliminating the ACA's individual mandate. Religious healthcare

providers and conservative state leaders have joined this effort by attacking the constitutionality of the ACA in court. The passing of Justice Ruth Bader Ginsburg in September 2020 could impact the outcome of the ACA's case, as the Court has lost one of its leading liberal jurists. Although the fight to maintain the validity of the ACA is far from over, if it is struck down by the Court, transgender people will lose an important avenue of redressing sex discrimination and ensuring equal access in healthcare, which is especially crucial in the midst of an international pandemic. Because of the ACA's uncertain future, section 1557 serves as only a "Band-Aid fix" to protecting transgender people in healthcare—until transgender people are unequivocally protected by federal discrimination laws.

The ever-changing and uneven protections afforded to transgender citizens across the United States underscores the need for federal legislation to solidify these rights. The ability to receive comprehensive healthcare as a transgender person should not bow to the political pressure of a presidential administration, nor should courts continue to squabble over whether the transgender community deserves the same protections already afforded to their cisgender counterparts. Federal protections for transgender people in healthcare—and other areas of their lives—are long overdue. In the words of the *Grimm* court, "[i]t is time to move forward."

Sarah Clemens