

2021

## Necessary Coverage for Authentic Identity: How *Bostock* Made Title VII the Strongest Protection Against Employer-Sponsored Health Insurance Denial of Gender-Affirming Medical Care.

Jennifer A. Knackert

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Human Rights Law Commons](#)

---

### Repository Citation

Jennifer A. Knackert, *Necessary Coverage for Authentic Identity: How Bostock Made Title VII the Strongest Protection Against Employer-Sponsored Health Insurance Denial of Gender-Affirming Medical Care.*, 105 Marq. L. Rev. 179 (2021).

Available at: <https://scholarship.law.marquette.edu/mulr/vol105/iss1/5>

This Response or Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

## **NECESSARY COVERAGE FOR AUTHENTIC IDENTITY: HOW *BOSTOCK* MADE TITLE VII THE STRONGEST PROTECTION AGAINST EMPLOYER-SPONSORED HEALTH INSURANCE DENIAL OF GENDER-AFFIRMING MEDICAL CARE.**

*In June 2020, the United States Supreme Court held that Title VII protection from discrimination on the basis of sex extended to LGBTQ+ employees. The Bostock v. Clayton County, Georgia decision dealt with three separate cases where LGBTQ+ employees had been fired from their jobs based on either their sexual orientation or gender identity. While the shared issue in these cases had to do with employee termination, the textualist argument presented by the Court leads many legal scholars to believe that the holding would be applicable to other areas of employment discrimination covered by Title VII such as employer-sponsored healthcare coverage for gender-affirming medical care.*

*Prior to this expansion of Title VII, plaintiffs were able to utilize expanded protections from Section 1557 of the Affordable Care Act, Title I of the Americans with Disabilities Act, the Equal Protection Clause of the Fourteenth Amendment, the Employee Retirement Income Security Act of 1974, and state and local protections. However, the Bostock interpretation will likely become increasingly important to LGBTQ+ advocates now that major avenues of protection against LGBTQ+ workplace discrimination have been drastically weakened by recent administrative policies.*

*This Comment will provide an overview of Title VII's historical protection of employees from sex discrimination through employer-based medical coverage, the expansion of this protection to LGBTQ+ individuals through the Bostock decision, and a comparison of this expansion to other avenues for fighting discrimination in medical coverage for gender affirming medical care. Ultimately, this Comment will propose that the Bostock decision has made Title VII the strongest path currently available for protection against refusal of coverage for gender-affirming medical care by employer-sponsored health insurance.*

I. INTRODUCTION.....	181
A. A History of Access to Healthcare for Transgender and Gender- Expansive Individuals.....	183
B. Potential Remedies for Denials of Health Care Coverage for Gender-Affirming Medical Care .....	184
II. THE EVOLUTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROTECTION OF EMPLOYER-SPONSORED HEALTHCARE COVERAGE FOR PROTECTED CLASSES .....	185
A. The Origins of Title VII’s “Sex”.....	185
B. The Evolution of Title VII’s “Sex” .....	186
C. The History of Other Federal Protections of Employer-Sponsored Healthcare Coverage for the LGBTQ+ Community .....	188
III. <i>BOSTOCK</i> ’S EXPANSION OF TITLE VII PROTECTIONS FROM EMPLOYER DISCRIMINATION AGAINST LGBTQ+ EMPLOYEES .....	189
IV. <i>BOSTOCK</i> ’S TITLE VII IN COMPARISON TO OTHER AVENUES OF FEDERAL PROTECTION FOR ACCESS TO GENDER-AFFIRMING MEDICAL CARE	191
A. Section 1557 of the Affordable Care Act and Coverage of Gender Identity .....	191
B. Title I of the Americans with Disabilities Act and Coverage of Gender Dysphoria .....	192
C. The Equal Protection Clause of the Fourteenth Amendment.....	194
D. The Employee Retirement Income Security Act of 1974 .....	196
E. State and Local Protections .....	197
V. CONCLUSORY ANALYSIS AND RECOMMENDATIONS .....	198
A. Who Comes Out on Top?.....	198
B. Room for Improvement .....	199
C. Predicting the Future .....	201
D. Conclusion.....	204

## I. INTRODUCTION

In *Bostock v. Clayton County, Georgia*, the United States Supreme Court considered whether Title VII of the Civil Rights Act of 1964 prevented an employer from firing an employee for being gay<sup>1</sup> or transgender.<sup>2</sup> The Court took a textualist approach to the issue and ultimately determined that if an employee's sex is at least one cause of the employee's termination, then that cause would violate the employee's Title VII rights to be free from discrimination based on their identity as a gay or transgender person.<sup>3</sup> The Court further determined that intentional discrimination against a gay or transgender employee is bound up in sex discrimination, and one cannot really exist without the other.<sup>4</sup> Therefore, firing an employee based on their sexual orientation<sup>5</sup> or transgender status would violate Title VII.<sup>6</sup> But, security from termination based on identity is only one concern for the transgender and gender-expansive<sup>7</sup> community when it comes to employment discrimination.

In the United States, approximately 1.4 million adults and 150,000 children (ages 13–17) identify as transgender or gender-expansive.<sup>8</sup> Many, but not all, members of this community will seek out one or more types of gender-

---

1. Gay describes “[a] person who is emotionally, romantically or sexually attracted to members of the same gender. Men, women and non-binary people may use this term to describe themselves.” *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [<https://perma.cc/MC3M-TC3U>].

2. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). Transgender is “[a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.” HUM. RTS. CAMPAIGN, *supra* note 1.

3. *Bostock*, 140 S. Ct. at 1744.

4. *Id.* at 1745.

5. Sexual orientation is “[a]n inherent or immutable enduring emotional, romantic or sexual attraction to other people. Note: an individual’s sexual orientation is independent of their gender identity.” HUM. RTS. CAMPAIGN, *supra* note 1.

6. *Bostock*, 140 S. Ct. at 1745.

7. Gender expansive is “[a]n umbrella term sometimes used to describe people who expand notions of gender expression and identity beyond perceived or expected societal gender norms. Some gender-expansive individuals identify as a mix of genders, some identify more binarily as a man or a woman, and some identify as no gender.” *PFLAG National Glossary of Terms*, PFLAG (Jul. 2021), <https://pflag.org/glossary> [<https://perma.cc/ECA3-TCGR>].

8. AM. MED. ASS’N, ISSUE BRIEF: HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING CARE OF TRANSGENDER PATIENTS (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf> [<https://perma.cc/9WEQ-LTKY>].

affirming care.<sup>9</sup> This care comes in multiple different forms, such as hormone therapy, speech modification interventions, plastic surgery, and various masculinizing or feminizing surgeries in order to affirm someone's gender identity.<sup>10</sup> Gender-affirming surgeries can range from about \$2,500 to \$25,000 per surgery<sup>11</sup> and hormone replacement therapies can range from about \$500 to \$5,000 per year.<sup>12</sup> Coupled with long recovery periods, potential pre-requirements of therapy, and an average poverty rate amongst the transgender community of fifteen percent, or four times the national average poverty rate, these gender-affirming care options are out of reach for many transgender and gender-expansive individuals.<sup>13</sup> Those who want, and are able to, access gender-affirming medical care experience lower rates of suicide, improved mental health, and healthier relationships overall.<sup>14</sup>

However, accessing health care can be a quagmire for transgender and gender-expansive individuals who not only deal with personal experiences of discrimination by healthcare professionals, but also frequent challenges to their access to medical coverage for gender-affirming care.<sup>15</sup> In order to fight these

---

9. Madeline B. Deutsch, *Overview of Gender-Affirming Treatments and Procedures*, UNIV. OF CAL., S.F. (Jun. 17, 2016), <https://transcare.ucsf.edu/guidelines/overview#:~:text=Gender%2Daffirming%20hormone%20therapy%20is,with%20an%20individual's%20gender%20identity> [<https://perma.cc/BBV5-X4P6>].

10. *Id.*

11. THE PHILA. CTR. FOR TRANSGENDER SURGERY, *Male to Female Price List*, <http://www.thetransgendercenter.com/index.php/maletofemale1/mtf-price-list.html> [<https://perma.cc/7KYL-86JD>]; THE PHILA. CTR. FOR TRANSGENDER SURGERY, *Female to Male Price List*, <http://www.thetransgendercenter.com/index.php/maletofemale1/mtf-price-list.html> [<https://perma.cc/7F3G-HG4P>].

12. HORMONE THERAPY CTRS. FOR AM., *How Much Does Hormone Therapy Cost?*, (Apr. 27, 2020), <https://ht-ca.com/blog/how-much-does-hormone-replacement-therapy-cost/> [<https://perma.cc/7MW4-H3PW>].

13. Chris Taylor, *Doing the Transgender Math: The Costs of Transition*, REUTERS (Oct. 29, 2015, 9:12 AM), <https://www.reuters.com/article/us-transgender-costs/doing-the-transgender-math-the-costs-of-transition-idUSKCN0SN1UA20151029> [<https://perma.cc/HWZ8-FKWV>]; CLEVELAND CLINIC, *Gender Affirmation (Confirmation) or Sex Reassignment Surgery* (May 3, 2021), <https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery> [<https://perma.cc/4U5R-W3JB>].

14. AM. MED. ASS'N, *supra* note 8.

15. Rachel C. Kurzweil, "Justice Is What Love Looks Like in Public": *How the Affordable Care Act Falls Short on Transgender Health Care Access*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 199, 211–12 (2014).

instances of discrimination, transgender and gender-expansive individuals have pursued a variety of legal solutions.<sup>16</sup>

*A. A History of Access to Healthcare for Transgender and Gender-Expansive Individuals*

Historically, many insurance plans have not only denied coverage for these types of gender-affirming medical care, but have also included explicit and broad exclusions in their policies.<sup>17</sup> Additionally, some employers believe that including coverage for gender-affirming care in their plans will raise premiums, however, recent studies have shown that this is not the case because this kind of care is rare.<sup>18</sup> In 2015, of those who sought health care coverage for gender-affirming treatment, fifty-five percent were denied for surgery and twenty-five percent were denied for hormones.<sup>19</sup> In some cases, this denial extends beyond gender-affirming care and individuals find themselves denied health care coverage altogether or denied coverage for medical care that is unrelated to gender transition.<sup>20</sup>

In evaluating the strength of a Title VII protection, it is essential to examine how employers impact this coverage. Employer-sponsored coverage is the largest source of healthcare for those living in the United States, largely outpacing Medicaid, Medicare, non-group, and military-sponsored healthcare.<sup>21</sup> In 2019, about 158,000,000 of people in the United States, or 49.6% of the census population, obtained their healthcare coverage through their employer.<sup>22</sup> The vast impact of employer-sponsored healthcare cannot be

---

16. See Kathryn J. Kennedy, *Coverage in Transition: Considerations When Expanding Employer-Provided Health Coverage to LGBTI Employees and Beneficiaries*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 1 (2017).

17. Andre A. Wilson & Jamison Green, *Health Insurance Coverage Issues for Transgender People in the United States*, UNIV. OF CAL., S.F. (Jun. 17, 2016), <https://transcare.ucsf.edu/guidelines/insurance> [<https://perma.cc/8BC3-7SAU>].

18. Kurzweil, *supra* note 15, at 216–17.

19. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY*, WASHINGTON, DC: NAT'L CTR. FOR TRANSGENDER EQUAL., 10 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/5QUN-2B8X>].

20. Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 96 (2002).

21. KAISER FAM. FOUND. HEALTH INSURANCE COVERAGE OF THE TOTAL POPULATION <https://www.kff.org/other/state-indicator/total-population/?dataView=0&currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/8VJX-YT4M>].

22. *Id.*

understated and reveals the importance of access to legal protections for transgender and gender-expansive individuals.

*B. Potential Remedies for Denials of Health Care Coverage for Gender-Affirming Medical Care*

To battle denials of health care coverage, transgender and gender-expansive individuals have pursued a variety of legal arguments through the Affordable Care Act (ACA),<sup>23</sup> the Americans with Disabilities Act (ADA),<sup>24</sup> the Fourteenth Amendment's Equal Protection Clause,<sup>25</sup> the Employee Retirement Income Security Act of 1974 (ERISA),<sup>26</sup> state and local regulations,<sup>27</sup> and Title VII.<sup>28</sup> With the restriction of many of these legal avenues for battling discrimination on the basis of gender identity or expression in access to healthcare,<sup>29</sup> the recent *Bostock* decision has presented an unexpected route for increased protection under Title VII.<sup>30</sup> The *Bostock* decision expanded Title VII protections to include workplace discrimination against the LGBTQ+<sup>31</sup> population as sex discrimination.<sup>32</sup> The ongoing challenges to the other routes for protection have caused Title VII to emerge as the strongest potential

---

23. See *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018); *Flack v. Wis. Dep't. of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018).

24. *Blatt v. Cabela's Retail, Inc.*, No. 5:15-cv-04882, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

25. Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016).

26. Kennedy, *supra* note 16, at 24–25.

27. Judson Adams, Halle Edwards, Rachel Guy, Maya Springhawk Robnett, Rachel Scholz-Bright & Breanna Weber, *Transgender Rights and Issues*, 21 GEO. J. GENDER & L. 479, 501 (2020).

28. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

29. Selena Simmons-Duffin, *Transgender Health Protections Reversed by Trump Administration*, NPR (Jun. 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/2YTP-APZQ>].

30. Katie Keith, *Supreme Court Finds LGBT People Are Protected From Employment Discrimination: Implications For The ACA*, HEALTH AFFAIRS BLOG (Jun. 16, 2020) <https://www.healthaffairs.org/doi/10.1377/hblog20200615.475537/full/> [<https://perma.cc/95Q6-94KS>].

31. LGBTQ+ is “[a]n acronym that collectively refers to individuals who are lesbian, gay, bisexual, transgender, or queer . . . . The addition of the Q for queer is a more recently preferred version of the acronym . . . . The Q can also stand for questioning, referring to those who are still exploring their own sexuality and/or gender. The ‘+’ represents those who are part of the community, but for whom LGBTQ does not accurately capture or reflect their identity.” PFLAG, *supra* note 7.

32. *Bostock*, 140 S. Ct. at 1737.

protection for transgender and gender-expansive individuals against refusal of coverage for gender-affirming medical care by employer-sponsored health plans.

This Comment will proceed as follows. Part II of this Comment will explore the origins and evolution of how Title VII of the Civil Rights Act of 1964 has ensured employer-sponsored healthcare coverage for protected classes.<sup>33</sup> Part III will evaluate the *Bostock v. Clayton County, Georgia* decision and how it has potentially expanded Title VII protections of employer-sponsored medical coverage of gender-affirming medical care for transgender and gender-expansive individuals.<sup>34</sup> Part IV will compare *Bostock*'s bolstering of Title VII protections to other avenues of federal and state protections commonly used by transgender and gender-expansive individuals in fighting cases of denied coverage for gender-affirming medical care.<sup>35</sup> Finally, Part V will analyze whether *Bostock*'s bolstering of Title VII makes it a substantially strong route for protection of employer-sponsored medical coverage for gender-affirming care or just stronger when compared to the other possible routes.<sup>36</sup>

## II. THE EVOLUTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROTECTION OF EMPLOYER-SPONSORED HEALTHCARE COVERAGE FOR PROTECTED CLASSES

### A. The Origins of Title VII's "Sex"

The Civil Rights Act passed by Congress in 1964 included Title VII which provided protections for current and potential employees from workplace discrimination based on the protected classes of race, color, religion, sex, or national origin.<sup>37</sup> "Sex" is the class that is implicated in cases revolving around rights for the transgender and gender-expansive community.<sup>38</sup> Looking at the origins of the word "sex" in the text is important because some individuals do not believe that the framers of this Act considered transgender and gender-expansive individuals in the term "sex."<sup>39</sup> Some scholars see the inclusion of LGBTQ+ identities within sex discrimination as antithetical to its purpose and

---

33. See *infra* Part II.

34. See *infra* Part III.

35. See *infra* Part IV.

36. See *infra* Part V.

37. 42 U.S.C. § 2000e-2 (2018).

38. Courtney E. Ruggeri, *Let's Talk About Sex: A Discussion of Sexual Orientation Discrimination Under Title VII*, 61 B.C. L. REV. II.-34, II.-38 (2020).

39. *Id.*



would end sex-segregated facilities and activities and thus, would undermine women's equal rights.<sup>40</sup> Others see it as an opportunity to enforce a more intersectional approach to Title VII.<sup>41</sup>

Historically, courts have stood behind the idea that Congress intended Title VII's "sex" to be interpreted through the traditional lens of a man and woman and not to encompass transgender or gender-expansive individuals.<sup>42</sup> However, those who have studied the legislative history regarding the inclusion of the term "sex" have found that its true purpose was actually to derail the passage of the legislation as a whole.<sup>43</sup> Howard Smith, a congressman from Virginia, proposed the addition of the term "sex" to the Act's list of protected categories through the Smith Amendment.<sup>44</sup> Smith was not known as a champion of civil rights and during his verbal support of the amendment, he quoted from a constituent letter saying that because women outnumbered men, the government should ensure each woman has the right to marry a husband and have a family.<sup>45</sup> This vague history of the term's addition creates a rather weak legislative intent argument for what the purpose of "sex" was within Title VII.<sup>46</sup>

### B. *The Evolution of Title VII's "Sex"*

The general lack of legislative intent around the word "sex" leads us to look to the United States Supreme Court for an understanding of how to apply "sex" in the context of Title VII cases. The Court expanded the definition of "sex" within Title VII in *Price Waterhouse v. Hopkins* by holding that "sex discrimination was not limited to discrimination based on biological sex alone" and that an individual cannot be discriminated against for not conforming to gender stereotypes.<sup>47</sup> Additionally, Congress later modified Title VII so that it made clear that it is still discrimination even if sex is only one of multiple

---

40. Ryan T. Anderson, *On the Basis of Identity: Redefining "Sex" in Civil Rights Law and Faulty Accounts of "Discrimination"*, 43 HARV. J.L. & PUB. POL'Y 387, 391 (2020).

41. Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 788 (2020).

42. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977); see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–85 (7th Cir. 1984); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004).

43. Teresa Shulda, *Does Discrimination "Because of Sex" Cover Sexual Orientation and Gender Identity Discrimination? The Evolution of Title VII*, 87 J. KAN. B. ASS'N 54, 55 (2018).

44. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. COM. L. REV. 431, 441 (1966).

45. *Id.* at 441–42.

46. Shulda, *supra* note 43, at 56.

47. Ruggeri, *supra* note 38, at II.-41–II.-42.

“motivating factors.”<sup>48</sup> Then, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court expanded sex discrimination to include harassment that occurs between a perpetrator and victim who are of the same sex.<sup>49</sup>

*Price* opened the door to cases brought by transgender and gender-expansive individuals who were discriminated against when they did not conform to expected gender stereotypes.<sup>50</sup> Transgender and gender-expansive individuals were also able to latch onto the Court’s reasoning in cases dealing with similar topics like interracial marriage and show that the discrimination faced by interracial couples was similar in nature to the discrimination transgender and gender-expansive individuals faced.<sup>51</sup> Changes in societal opinions and understandings of the LGBTQ+ community also greatly affected the evolution of the legal landscape surrounding Title VII and its applicability to transgender and gender-expansive individuals.<sup>52</sup> Finally, the diminishing interest and necessity of gender-based distinctions in public society, such as gender-based dress codes in the workplace, has seeped into the conversation and invalidated a number of previously successful defenses in Title VII cases.<sup>53</sup>

When it comes to the impact of Title VII on employer-sponsored medical care, included in its definition of “unlawful employment practices” is the phrase “with respect to . . . compensation, terms, conditions, or privileges of employment.”<sup>54</sup> Title VII has undergone additional changes via legislation and case law to further clarify its coverage of employer-sponsored healthcare based on sex. Probably the most notable change was the Pregnancy Discrimination Act (PDA) which amended Title VII to include pregnancy discrimination as prohibited sex discrimination.<sup>55</sup> This Act added “pregnancy, childbirth, or related medical conditions” to Title VII’s definition of “because of sex.”<sup>56</sup> After the passage of the PDA, the Supreme Court further emphasized that sex-based disparities in employer-sponsored health insurance violated Title VII

---

48. Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII’s Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 113–14 (2019).

49. Ruggeri, *supra* note 38, at II-43; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77, 82 (1998).

50. Clarke, *supra* note 48, at 114–15.

51. *Id.* at 121.

52. *Id.*

53. *Id.* at 125–26.

54. 42 U.S.C. § 2000e-2 (2018).

55. Stephen F. Befort & Elizabeth C. Borer, *Equitable Prescription Drug Coverage: Preventing Sex Discrimination in Employer-Provided Health Plans*, 70 LA. L. REV. 205, 211 (2009).

56. *Id.* at 212 (quoting 42 U.S.C. § 2000e(k)(2006)).

protections because these fringe benefits fell under the “compensation, terms, conditions, or privileges of employment” umbrella outlined in Title VII.<sup>57</sup>

*C. The History of Other Federal Protections of Employer-Sponsored Healthcare Coverage for the LGBTQ+ Community*

The United States Supreme Court has also expanded its understanding of medical coverage outside of Title VII to include more aspects of the lives of LGBTQ+ citizens. In *United States v. Windsor*, the Court found the Defense of Marriage Act to be unconstitutional and ensured the federal government had to recognize same-sex marriages already recognized by a state.<sup>58</sup> This decision ensured tax exclusions for medical coverage were expanded to medically necessary treatments for same-sex spouses.<sup>59</sup> It also slightly opened the door for transgender individuals living in states where transitions are not formally recognized to access healthcare benefits.<sup>60</sup> In *Obergefell v. Hodges*, the Court required states to recognize marriages between same-sex couples as legal marriage.<sup>61</sup> As a result of this decision, employer-sponsored health insurance plans needed to include same-sex partners in employee spousal coverage.<sup>62</sup> While these decisions did not focus on Title VII, they revealed a willingness of the Court to include members of the LGBTQ+ community in federal protections that impacted access to employer-sponsored healthcare coverage. However, these decisions did not directly or explicitly include transgender or gender-expansive individuals beyond potentially recognizing their right to marry.<sup>63</sup>

Employer-sponsored health insurance plans will usually cover what they consider reasonable and “medically necessary” treatments.<sup>64</sup> Some courts have been willing to consider some gender-affirming care as medically necessary, but the more “cosmetic” the treatment, the more likely a health insurance plan

---

57. E. Renee Backmeyer, *Lack of Insurance Coverage for Prescription Contraception by an Otherwise Comprehensive Plan as a Violation of Title VII as Amended by the Pregnancy Discrimination Act—Stretching the Statute Too Far*, 37 IND. L. REV. 437, 442–43 (2004) (discussing *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983)). See 42 U.S.C. § 2000e-2 (2018).

58. Kennedy, *supra* note 16, at 26.

59. *United States v. Windsor*, 570 U.S. 744 (2013). See also Kennedy, *supra* note 16, at 10–11.

60. Kurzweil, *supra* note 15, at 235–36.

61. *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

62. *Id.* at 670.

63. Kennedy, *supra* note 16, at 28.

64. *Id.* at 12.

is able to justify denying coverage of the treatment.<sup>65</sup> When these treatments are deemed not medically necessary, it allows insurance companies to justify the denial of coverage under the guise of cost-saving measures.<sup>66</sup> In observing employer-sponsored medical coverage of gender-affirming care under these circumstances, the terrain remains unpredictable and rocky for many individuals.

### III. *BOSTOCK*'S EXPANSION OF TITLE VII PROTECTIONS FROM EMPLOYER DISCRIMINATION AGAINST LGBTQ+ EMPLOYEES

In an unprecedented decision by the United States Supreme Court in June of 2020, Title VII became a stronger route for access to employer-sponsored health care coverage for gender-affirming care for transgender and gender-expansive individuals.<sup>67</sup> The *Bostock v. Clayton County, Georgia* case combined three cases where employees claimed they were fired for their sexual orientation or gender identity.<sup>68</sup> The first case involved a child welfare advocate, Gerald Bostock, who was fired by his employer after joining a gay softball league.<sup>69</sup> The second case involved a skydiving instructor, Donald Zarda, who was fired by his employer after mentioning he was gay.<sup>70</sup> The third case involved a funeral home employee, Aimee Stephens, who was fired after she wrote a letter to her employer informing them of her transition and intention to show up to work presenting as a woman.<sup>71</sup> While all three cases took a similar route, they each came out differently at the district court level.<sup>72</sup>

The Court determined that it needed to evaluate the “ordinary public meaning” of Title VII’s antidiscrimination provision.<sup>73</sup> The Court’s analysis first focused on the protected characteristic of “sex” and its modifier “because of.”<sup>74</sup> The employees in the case conceded to the interpretation of sex as the “biological distinctions between male and female.”<sup>75</sup> For the “because of” modifier, the Court looked to prior precedent and determined that the standard

---

65. *Id.* at 13–17 (analyzing *O’Donnabhain v. Comm’r.*, 134 T.C. 34 (T.C. 2010)).

66. Adams, *supra* note 27, at 495.

67. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

68. *Id.* at 1737.

69. *Id.* at 1737–38.

70. *Id.* at 1738.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1739.

75. *Id.*

was but-for causation.<sup>76</sup> “So long as the plaintiff’s sex was one but-for cause of that decision, that [was] enough to trigger the law.”<sup>77</sup> When it came to the term “discriminate,” the Court pointed to its repeated proximity to the word “individual.”<sup>78</sup> The Court determined that the law must be interpreted from the individual level, so an employer cannot be absolved of their discriminatory behavior against one employee by claiming they treat all who identify with the employee’s sex preferentially or that they equally discriminate against those of the other sex equally.<sup>79</sup>

Next, the Court turned to determining whether intentional discrimination based on an employee being gay or transgender is sex discrimination.<sup>80</sup> Sexual orientation and gender identity are intrinsically tied up in an individual’s sex.<sup>81</sup> The Court stated that “an employer who discriminate[s] against homosexual or transgender employees necessarily and intentionally applies sex-based rules.”<sup>82</sup>

Ultimately, the Court established a solid standard for employer-sponsored discrimination against LGBTQ+ individuals under Title VII. If an employee is fired for being gay or transgender, regardless of the label, then it is discrimination based on the employee’s sex.<sup>83</sup> Additionally, the employee’s sex need not be the only cause, but *a* cause of the termination for the employer’s actions to be a violation of Title VII.<sup>84</sup> And finally, an employer remains liable for discrimination even if they can prove they treat males and females the same within the identity group of gay or transgender.<sup>85</sup> *Bostock* established a new standard for understanding sex discrimination in the employment context and opened the door for a potentially stronger argument for those seeking gender-affirming care from their employer-sponsored healthcare.

---

76. *Id.*

77. *Id.*

78. *Id.* at 1741.

79. *Id.*

80. *Id.* at 1745.

81. *Id.* at 1746.

82. *Id.* at 1745.

83. *Id.* at 1744.

84. *Id.*

85. *Id.*

#### IV. *BOSTOCK*'S TITLE VII IN COMPARISON TO OTHER AVENUES OF FEDERAL PROTECTION FOR ACCESS TO GENDER-AFFIRMING MEDICAL CARE

##### A. *Section 1557 of the Affordable Care Act and Coverage of Gender Identity*

For a while, one of the strongest avenues for those seeking protection for employer-sponsored coverage for gender-affirming medical care was Section 1557 of the Affordable Care Act (ACA).<sup>86</sup> Passed in May of 2016, Section 1557 expanded the definition of sex within the ACA to include “gender identity.”<sup>87</sup> The rule further clarified that the use of “gender identity” encompassed “gender expression” and transgender status, and included those who identify as gender nonbinary.<sup>88</sup> The ACA itself applied to a large variety of healthcare providers, hospitals, and medical systems that received federal funding, including some private employers.<sup>89</sup> For some transgender and gender-expansive individuals, Section 1557 opened the door to some necessary wrap-around services when it comes to gender-affirming medical care through increased coverage of mental health services and substance abuse treatment,<sup>90</sup> as well as preventative services that may be “sex-specific.”<sup>91</sup> Section 1557 even provided access to coverage of gender-affirming surgeries or hormonal therapies for others.<sup>92</sup>

However, Section 1557 did not completely clear the way for coverage of gender-affirming care. Because the ACA only applied to entities that receive federal funds, Section 1557’s effect on employer-sponsored health insurance was inconsistent and unclear.<sup>93</sup> Insurers were still able to deny transgender and gender-expansive patients’ coverage of transition-related surgeries or hormone therapy due to the care being considered “cosmetic” in nature or “medically unnecessary.”<sup>94</sup> Some providers were also able to carve out religious

---

86. 45 C.F.R. § 92.1 (2016).

87. *Id.* § 92.206.

88. *Id.* § 92.4.

89. Kurzweil, *supra* note 15, at 227–28.

90. *Id.* at 231–34.

91. DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND TREASURY, FAQs ABOUT AFFORDABLE CARE ACT IMPLEMENTATION (PART XXVI), 6 (2015), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xxvi.pdf#page=6> [<https://perma.cc/SJ2P-63C5>].

92. *See* *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953–54 (D. Minn. 2018); *See also* *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 989 (W.D. Wis. 2018).

93. Kurzweil, *supra* note 15, at 226–27.

94. Kurzweil, *supra* note 15, at 248–54.

exemptions for Section 1557's requirements.<sup>95</sup> Additionally, in June of 2020, the Department of Health and Human Services (HHS) issued a final rule which revised Section 1557 by removing "gender identity" and its expansive meaning from the definition of "sex."<sup>96</sup> The HHS rule left the decision of whether gender identity should be covered under medical coverage nondiscrimination rules up to the states.<sup>97</sup> Because this rule came out right when *Bostock* was being decided, some courts saw the new HHS rule as unenforceable.<sup>98</sup> After the Biden administration took over, the HHS added "gender identity" back in and introduced "sexual orientation" as well to bring the rule in alignment with the *Bostock* decision.<sup>99</sup>

By its original nature, the ACA, with Section 1557, has always been an imperfect protection for medical coverage of gender-affirming care in all its forms. While the recent changes to its language strengthen and expand its protection, its vulnerability to political shifts make it unlikely to be a very effective solution when it comes to protections against gender identity discrimination. Ultimately, the ACA in its current state is unlikely to be a stronger avenue of protection than a Title VII claim through the lens of *Bostock*.

#### *B. Title I of the Americans with Disabilities Act and Coverage of Gender Dysphoria*

Another major route that transgender and gender-expansive individuals have often pursued in efforts to access medical coverage for gender-affirming care is the Americans with Disabilities Act (ADA).<sup>100</sup> Usually, for individuals

---

95. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 689–91 (N.D. Tex. 2016) (holding that the expansion of the definition of the term sex to include gender identity goes against precedent and that this expansion does not do away with the religious exemptions already granted under 20 U.S.C. § 1681(a)(3)).

96. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,161–62 (June 19, 2020) (to be codified at 45 C.F.R. pt. 92, 440 & 460 and 42 C.F.R. pt. 86, 92, 147, 155 & 156).

97. *Id.*

98. *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020).

99. Press Release, U.S. DEP'T OF HEALTH AND HUM. SERVS., HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity (May 10, 2019), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html> [<https://perma.cc/446J-76SE>].

100. Ali Szemanski, *When Trans Rights Are Disability Rights: The Promises And Perils Of Seeking Gender Dysphoria Coverage Under The Americans With Disabilities Act*, 43 HARV. J.L. & GENDER 137, 139 (2020).

to qualify for protection under the ADA they must have a “disability.”<sup>101</sup> When it comes to transgender or gender non-conforming individuals, a diagnosis of gender dysphoria falls within the scope of the ADA’s definition of “disability.”<sup>102</sup> Gender dysphoria is considered both a physical and mental impairment consisting of an inconsistent relationship between one’s gender identity and sex assigned at birth.<sup>103</sup> While the ADA has historically excluded “gender identity disorders” from the definition of a disability, there is prior precedent holding that gender dysphoria is not a part of this exclusion.<sup>104</sup> Specifically, the United States District Court for the Eastern District of Pennsylvania held in *Blatt v. Cabela’s Retail Inc.* that gender dysphoria did not fall under disability’s gender identity exclusion because it is considered a medical condition.<sup>105</sup>

When it comes to the ADA’s protection of employer-sponsored medical care, Title I provides a good starting point. Title I prohibits discrimination based on disability when it comes to “terms, conditions, and privileges of employment.”<sup>106</sup> This provision covers both discrimination by an employer and any entity the employer contracts with that may provide fringe benefits like health insurance.<sup>107</sup> Title I includes robust language that can provide protection against a variety of denials of medical coverage for treatments associated with gender dysphoria such as hormone therapy and gender-affirming surgeries.<sup>108</sup>

However, while there is ample case law to create the impression that gender-affirming care would be covered by Title I, there is very little specific precedent proving this exact argument, let alone precedent that would be binding on all courts.<sup>109</sup> In fact, the court in *Doe v. Northrop Grumman Systems Corporation* refused to follow the holding in *Blatt* and instead held that gender dysphoria was synonymous with gender identity disorder and therefore excluded from the definition of a disability.<sup>110</sup>

---

101. Barry, *supra* note 25, at 509; 42 U.S.C. § 12112(a) (2018).

102. Barry, *supra* note 25, at 509.

103. *Id.* at 513.

104. *Id.* at 510, 524, 526.

105. Szemanski, *supra* note 100, at 139; *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*4 (E.D. Penn. May 18, 2017).

106. 42 U.S.C. § 12112(a) (2018).

107. 42 U.S.C. § 12112(b)(2) (2018).

108. Szemanski, *supra* note 100, at 145.

109. *See Glenn v. Brumby*, 663 F.3d 1312, 1317–18 n.5 (11th Cir. 2011) (citing cases).

110. *Doe v. Northrop Grumman Sys. Corp.*, 418 F. Supp. 3d 921, 929 (N.D. Ala. 2019).



Additionally, there is some risk in the need for the formal label of a disability like gender dysphoria in order to access protections for medical coverage.<sup>111</sup> The transgender community has a long history of being labeled as having a mental deficiency, which has only added to the stigma around their identity.<sup>112</sup> Some scholars believe that the continued “pathologization” of transgender people further positions them as something that is abnormal and in need of correction in some way.<sup>113</sup> It would also be prudent to point out that the entire disabled community faces this unfair stigma.<sup>114</sup> In contrast, some trans people do appreciate the framing of the trans experience as a disorder because it more concretely represents the stress that an individual can face when their gender identity does not match their sex assigned at birth.<sup>115</sup>

With the medical community viewing gender dysphoria as a more legitimate experience, the ADA presents a unique argument for transgender and gender-expansive individuals to claim necessity in cases where coverage of gender-affirming care is denied.<sup>116</sup> However, the United States Supreme Court has a tendency to avoid ADA cases, and disability advocates have been fighting an uphill battle to gain visibility under this law for some time now.<sup>117</sup> The lack of mandatory precedent and acknowledgement from the United States Supreme Court makes the ADA argument a weaker avenue in comparison to *Bostock’s* Title VII interpretation.

### C. *The Equal Protection Clause of the Fourteenth Amendment*

Cases of employer-sponsored health care discrimination against transgender or gender-expansive employees are also frequently brought under claims of a violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>118</sup> The Equal Protection Clause ensures all enjoy equal protection of

---

111. Nonnie L. Shivers, *A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage*, 33 ABA J. LAB. & EMP. L. 175, 176–77 (2018).

112. *Id.*

113. Szemanski, *supra* note 100, at 159–60.

114. *Id.*

115. Bridget Schaaff, *Using Federal Nondiscrimination Laws to Avoid ERISA: Securing Protection from Transgender Discrimination in Employee Health Benefit Plans*, 26 DUKE J. GENDER L. & POL’Y 45, 59 (2018).

116. Szemanski, *supra* note 100, at 154.

117. Szemanski, *supra* note 100, at 165–66.

118. *See* Glenn v. Brumby, 663 F.3d 1312, 1313 (11th Cir. 2011); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 982 (W.D. Wis. 2018).

law and prohibits states from infringing upon that right.<sup>119</sup> To analyze whether equal protection has been violated, courts apply strict, intermediate, or rational basis scrutiny depending on the identity classification at play.<sup>120</sup> Strict and intermediate scrutiny are considered heightened scrutiny—due to the high burden of proof placed on the government—and their use often results in a determination that the law in question is unconstitutional.<sup>121</sup> Historically, race, immigration status, and national origin have been subject to strict scrutiny, whereas sex and “illegitimacy of birth” have been subject to intermediate scrutiny.<sup>122</sup> To determine whether something should be subject to heightened scrutiny, the Court relies on four factors: (1) relevance of the classification; (2) history of discrimination against people who identify with the classification; (3) permanence of the classification; and (4) minority status or lack of political power of those who identify with the classification.<sup>123</sup>

There is still some debate over what level of scrutiny courts should apply in cases involving disparate treatment of transgender and gender-expansive individuals.<sup>124</sup> In a case involving a transgender woman who was fired for coming to work dressed as a woman, the Eleventh Circuit applied heightened scrutiny and ruled that firing a transgender employee based on their gender non-conformity violated the Equal Protection Clause.<sup>125</sup> The Court applied this level of scrutiny after determining that discrimination based on gender non-conformity is sex-discrimination.<sup>126</sup> Because the Eleventh Circuit is not the only court to apply this heightened level of scrutiny,<sup>127</sup> it would not be presumptive to say that the equal protection route would be a strong argument for transgender and gender-expansive people to rely on.

However, there are some other courts that do not share the view that the transgender identity falls under the definition of “sex,” nor that it is sufficient as a discrete and insular minority in its own right and should therefore not be afforded the heightened level of scrutiny on review.<sup>128</sup> While this view is becoming less and less popular, there still remains no Supreme Court precedent

---

119. Barry, *supra* note 25, at 541.

120. *Id.* at 541–42.

121. *Id.* at 542.

122. *Id.*

123. *Id.*

124. *Id.* at 509.

125. Glenn v. Brumby, 663 F.3d 1312, 1314, 1320 (11th Cir. 2011).

126. *Id.* at 1316.

127. Boyden v. Conlin, 341 F. Supp. 3d 979, 1000 (W.D. Wis. 2018).

128. See Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977).

dealing with discrimination against transgender or gender-expansive individuals nor defining those identities as their own protected class under the Equal Protection Clause.<sup>129</sup> Therefore, in comparison to *Bostock's* interpretation of Title VII, the Equal Protection Clause remains a weaker potential protection for transgender and gender-expansive individuals seeking to battle discrimination through the denial of coverage of gender-affirming care by employer-sponsored health insurance.

#### D. *The Employee Retirement Income Security Act of 1974*

When it comes to guaranteeing equality in health care coverage, some individuals have also turned to the Employee Retirement Income Security Act (ERISA).<sup>130</sup> ERISA created a federal standard that acts as a floor for how private health insurers must protect employees with employer-sponsored coverage.<sup>131</sup> In order to bring a claim under ERISA, employees must pursue their insurance's full claim procedures before filing a case and provide evidence to show that the treatment is a medical necessity for them specifically.<sup>132</sup> But, ERISA has not been a very successful route for transgender and gender-expansive individuals. Most notably, the Second Circuit found in *Mario v. P&C Food Markets* that a gender-affirming surgery was generally not a medical necessity and the plaintiff had not proved that their situation was so unique as to necessitate it.<sup>133</sup>

Additionally, plan providers are given the discretion to interpret their plans as broadly or narrowly as they wish.<sup>134</sup> ERISA itself does not contain explicit nondiscrimination protections and recent additions have done little to protect transgender or gender-expansive individuals.<sup>135</sup> So while Congress intended that ERISA supersede federal and state laws when it comes to governing employee health care coverage, federal precedent has upheld the nondiscrimination protections found in laws like Title VII and the ADA.<sup>136</sup>

---

129. Barry, *supra* note 25, at 572–73.

130. See *Baker v. Aetna Life Ins. Co.*, 260 F. Supp. 3d 694, 700 (N.D. Tex. 2017); See also *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 765 (2d Cir. 2002).

131. Schaaff, *supra* note 115, at 52.

132. Kennedy, *supra* note 16, at 24–25.

133. *Mario*, 313 F.3d at 765.

134. Kennedy, *supra* note 16, at 25.

135. Schaaff, *supra* note 115, at 52–53.

136. Schaaff, *supra* note 115, at 54–55.

Pushing back on the *Mario* decision, a variety of medical community associations have tried to make their stances on the issue clear.<sup>137</sup> The American Medical Association (AMA) took the stance that it is an act of discrimination to deny health insurance coverage based on a patient's gender identity.<sup>138</sup> The AMA also affirmatively encourages coverage of gender-affirming medical care as backed by medical research that reveals a positive impact on mental health outcomes.<sup>139</sup> Additionally, the American Psychiatric Association (APA) echoed the AMA by labeling gender-affirming care as medically necessary and challenging the exclusion of this care from coverage by insurance providers.<sup>140</sup>

But even with the support of major medical institutions, unless explicit nondiscrimination provisions are added to ERISA, it will likely hold little promise for transgender and gender-expansive individuals who are denied coverage for gender-affirming medical care by their employer-sponsored health care. This lack of an unequivocal shield makes ERISA a much weaker legal protection for employer-sponsored coverage of gender-affirming care when compared to *Bostock's* interpretation of Title VII.

#### *E. State and Local Protections*

With the general lack of predictability when it comes to many federal protections, and the reality that their efficacy often falls prey to the swinging political pendulum in Washington, some individuals have turned to legal protections at the state level. Fourteen states have enacted laws to ensure private insurance companies cannot discriminate based on sexual orientation.<sup>141</sup> But this does not necessarily include transgender or gender-expansive individuals.<sup>142</sup> However, twenty-one states plus the District of Columbia have enacted laws explicitly prohibiting health insurers from discriminating against transgender and gender-expansive individuals.<sup>143</sup> Some state-based healthcare

---

137. Kennedy, *supra* note 16, at 22–23.

138. William Besl, Larissa Johnson, James Rouchard & Sonja Swanbeck, *Employment Discrimination Against LGBT Persons*, 21 GEO. J. GENDER & L. 299, 326 (2020).

139. Kennedy, *supra* note 16, at 22.

140. *Id.* at 22–23.

141. Besl, *supra* note 138, at 325.

142. *See id.*

143. Adams, *supra* note 27, at 501.

providers have independently moved to expand their coverage of gender-affirming care and label it as medically necessary.<sup>144</sup>

Additionally, many states have their own disability antidiscrimination laws.<sup>145</sup> While a number of states have adopted most of the language from the ADA, only ten states also include the ADA's exclusions which include gender identity disorder (GID).<sup>146</sup> Courts in the other forty states have mainly held that gender-based disorders are protected under the state's disability law and some have required Medicaid coverage of gender-affirming care.<sup>147</sup>

However, some states lean heavily in the other direction when it comes to coverage of gender-affirming care. Currently, twelve states have passed laws that outright prohibit the coverage of gender-affirming care for state employees, and ten states prohibit coverage for this under Medicaid.<sup>148</sup> This impact is felt by many transgender and gender-expansive individuals as sixty-percent of the LGBTQ+ community live in states that do not have insurance protections in place for this community.<sup>149</sup> Some states, like Mississippi, also have their own religious exemption laws which allow healthcare providers to circumvent state anti-discrimination laws.<sup>150</sup>

This level of inconsistency between states' protections and prohibitions makes state-based solutions an uncertain and unpredictable route for transgender and gender-expansive individuals to pursue in order to ensure coverage. Without consistent, explicit protections for transgender and gender-expansive individuals' access to coverage for gender-affirming medical care, state protections are likely not as strong of an argument as the *Bostock* interpretation of Title VII.

## V. CONCLUSORY ANALYSIS AND RECOMMENDATIONS

### A. *Who Comes Out on Top?*

Based on the current status of the federal and state protections and the decision in *Bostock*, Title VII seems to be the strongest protection currently

---

144. Elizabeth Thompson, *Victory For LGBTQ: Blue Cross NC Expands Coverage For Trans Surgeries*, WFAE 90.7 (Jul. 22, 2021, 2:12 PM), <https://www.wfae.org/health/2021-07-22/victory-for-lgbtq-blue-cross-nc-expands-coverage-for-trans-surgeries> [https://perma.cc/S4BC-3V7R].

145. Barry, *supra* note 25, at 523–24.

146. *Id.*

147. *Id.* at 523–26.

148. Adams, *supra* note 27, at 501.

149. *Id.*

150. *Id.* at 506.

available to transgender and gender-nonconforming individuals for access to gender-affirming medical care. For a while, the ACA provided the most explicit protection against discrimination based on gender identity, gender expression and transgender status.<sup>151</sup> Unfortunately, the ease with which the language of such legislation can be altered by whatever political party is currently in power calls into question its viability as a strong legal avenue.<sup>152</sup> Protections like the ADA and the Equal Protection Clause provide unique arguments for plaintiffs. However, the lack of precedent from the United States Supreme Court that explicitly includes transgender and gender-expansive individuals as protected classifications weakens their reliability.<sup>153</sup> ERISA provides a unique opportunity for protection with its authority over private health insurers, but its lack of explicit nondiscrimination language gives it little power when it comes to ensuring coverage of gender-affirming care.<sup>154</sup> Finally, state- and local-based laws have created relatively strong legal arguments for transgender and gender-expansive individuals, but there are still many states that actively prohibit coverage of gender-affirming care making the terrain especially treacherous for many individuals.<sup>155</sup> Ultimately, *Bostock's* interpretation of Title VII has the potential to stand up more effectively than these other options in the current legal landscape and possibly provide transgender and gender-expansive individuals with a solid argument for employer-sponsored coverage of gender-affirming care.

### B. Room for Improvement

While the *Bostock* interpretation of Title VII provides a new facet of protection for transgender and gender-expansive individuals, it remains an imperfect and untested avenue for employer-sponsored health care coverage of gender-affirming care specifically. In the *Bostock* decision, Justice Gorsuch specifically pointed out that there were related issues that were not in front of the Court.<sup>156</sup> Issues like sex-segregated bathroom and locker room access or workplace dress codes were not in front of the Court.<sup>157</sup> To some, this signifies a narrowing of the decision and desire to punt other relevant and controversial

---

151. *Id.* at 498–501.

152. *See supra* Part IV.A.

153. *See supra* Part IV.B & C.

154. *See supra* Part IV.D.

155. *See supra* Part IV.E.

156. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020).

157. *Id.*

issues until there is a more applicable case before the Court.<sup>158</sup> What this means for employer-sponsored health care coverage is yet to be known.

Additionally, the Court also brought up the issue of religious exemptions to their ruling in *Bostock*. While the Court did not make a decision in that case, it did mention that it is an important consideration and hinted it may be a point of distinction in a future opinion.<sup>159</sup> Similarly, recent expansions of religious exemptions during the Trump administration and state legislation aimed at restricting coverage of gender-affirming care threaten to expand the ability for healthcare workers and institutions to deny care to transgender and gender-expansive individuals.<sup>160</sup> The Trump Administration's Protecting Statutory Conscience Rights in Health Care Final Rule, which aimed to expand religious exemptions, was vacated by a federal court until further notice and is unlikely to be pursued further by the Biden administration.<sup>161</sup> However, this push and pull between ideological counter positions will continue to dominate the conversation and the specific issue of discrimination against transgender and gender-expansive individuals is bound to come up again in a future United States Supreme Court case.

Even with the *Bostock* decision, Title VII remains more of a reactive rather than preventative measure when it comes to protections for transgender and gender-expansive individuals. The Trump administration put this reality to the test by immediately creating administrative rules that directly contradicted the ruling, which forced a flurry of judicial challenges that could potentially lead to the Court establishing more limiting distinctions.<sup>162</sup> Even with a different

---

158. Edward G. Phillips & Brandon L. Morrow, *Bostock v. Clayton County: An Expansion of Title VII*, 56 TENN. B.J. 40 (2020).

159. *Bostock*, 140 S. Ct. at 1754.

160. Adams, *supra* note 27, at 504; Patrick Svitek, *Gov. Greg Abbott says he'll soon unveil plan to restrict transition-related medical care for transgender children*, THE TEXAS TRIBUNE (Jul. 19, 2021), <https://www.texastribune.org/2021/07/19/texas-greg-abbott-transgender-health-care/> [https://perma.cc/MF8C-AZE3]; Madeleine Carlisle, *Federal Judge Temporarily Halts Arkansas Transgender Health Care Ban, Arguing It Causes 'Irreparable Harm.'* TIME (Jul. 21, 2021), <https://time.com/6082411/arkansas-trans-health-care-ban/>; Titus Wu & Jessie Balmert, *Ohio may let doctors refuse to give medical service if it violates their religious beliefs*, AKRON BEACON J. (Jun. 14, 2021), <https://www.beaconjournal.com/story/news/politics/state/2021/06/13/ohio-doctor-health-insurance-hospitals-discrimination-lgtbq-abortion-conscience-clause-religion/7635305002/> [https://perma.cc/PR9Y-SKEA].

161. U.S. DEP'T. OF HEALTH AND HUM. SERV., CONSCIENCE RULE VACATED (Nov. 8, 2019), <https://www.hhs.gov/conscience/conscience-rule-vacated/index.html> [https://perma.cc/DVE6-F9EY].

162. Chris Johnson, *How the Trump administration is getting around Bostock to allow anti-trans discrimination*, WASHINGTON BLADE (Sep. 16, 2020),

administration in control, not much is bound to change, and state politicians will most likely take up the mantle of forcing these distinctions.

With a burgeoning movement away from the gender binary and towards more expansive understandings of gender, it remains unclear whether *Bostock* will apply to nonbinary individuals.<sup>163</sup> However, some argue that the Court's reasoning—that discrimination based in part on sex is sex discrimination—would apply to nonbinary individuals who do not conform with a “set” sex identity.<sup>164</sup> Whether that argument would hold up is yet to be seen.

While *Bostock* served to strengthen Title VII claims by LGBTQ+ individuals, there is ample room for improvement before it can be deemed a solid route to protection of employer-sponsored coverage of gender-affirming care. Some scholars suggest a “multiaxial” approach that honors the intersectionality of individuals and moves the conversation around sex in Title VII beyond the binary understanding that was still present in the *Bostock* decision.<sup>165</sup> Ultimately, a Court decision that explicitly addresses healthcare coverage of gender-affirming care would solidify Title VII as the strongest protection for transgender and gender-expansive individuals.

### C. Predicting the Future

At the moment this Comment was written, the United States was changing constantly and rapidly. Amy Coney Barrett was confirmed as a Supreme Court Justice, Joe Biden became President, and the world continued to grapple with the COVID-19 pandemic.

When it comes to interpreting Title VII, it is clear that the United States Supreme Court will be the major player in deciding whether *Bostock*'s Title VII applies to employer-sponsored health care coverage of gender-affirming care. Justice Coney Barrett's confirmation in October 2020 solidified the

---

<https://www.washingtonblade.com/2020/09/16/how-the-trump-administration-is-getting-around-bostock-to-allow-anti-trans-discrimination/> [<https://perma.cc/NY58-AK9Y>].

163. Shirley Lin, *SCOTUS' Landmark Reading of Title VII "Sex" As Encompassing Sexual Orientation and Gender Identity*, HUM. RTS. AT HOME BLOG (Jun. 15, 2020), [https://lawprofessors.typepad.com/human\\_rights/2020/06/scotus-landmark-reading-of-title-vii-sex-as-encompassing-sexual-orientation-and-gender-identity.html](https://lawprofessors.typepad.com/human_rights/2020/06/scotus-landmark-reading-of-title-vii-sex-as-encompassing-sexual-orientation-and-gender-identity.html) [<https://perma.cc/QFC9-JQAF>].

164. William N. Eskridge, Jr. & Christopher R. Riano, *Bostock: A Statutory Super-Precedent for Sex and Gender Minorities*, AM. CONST. SOC'Y (Jul. 1, 2020), <https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities/> [<https://perma.cc/JV2V-XKS9>].

165. Lin, *supra* note 41, at 788.



conservative majority of the Court at 6-3.<sup>166</sup> Concern over Justice Coney Barrett amongst the LGBTQ+ community started the moment her nomination was announced.<sup>167</sup> Though there is little to point to in Justice Coney Barrett's past to establish her record on these issues, some have shown concern over her former position as a trustee for a school with anti-LGBTQ+ policies.<sup>168</sup> While Justice Coney Barrett's cementing of the conservative majority may lead to less protections for the LGBTQ+ community, it is not unprecedented for conservative justices to expand these rights either, as Justices Gorsuch and Kavanaugh showed us in *Bostock*.<sup>169</sup> Though recent words from Justices Alito and Thomas about a willingness to overturn the *Obergefell* decision does not bode well for a desire to expand rights for members of the LGBTQ+ community.<sup>170</sup>

A new administration will also present a changing landscape for avenues of protection for LGBTQ+ employees. In his victory speech, Joe Biden became the first president-elect to mention the transgender community specifically.<sup>171</sup> The Biden campaign promised to protect the LGBTQ+ community from discrimination and "[e]xpand access to high quality health care to LGBTQ+

---

166. Jemima McEvoy, *Amy Coney Barrett Confirmed To Supreme Court, Cementing Conservative Majority*, FORBES (Oct. 26, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/10/26/amy-coney-barrett-confirmed-to-supreme-court-cementing-conservative-majority/?sh=298889407e3e> [<https://perma.cc/W6J6-8348>].

167. Dawn Ennis, *Between Amy Coney Barrett And Donald Trump, Trans Americans Foresee Their Doom*, FORBES (Sep. 30, 2020), <https://www.forbes.com/sites/dawnstaceyennis/2020/09/30/between-amy-coney-barrett-and-donald-trump-trans-americans-foresee-their-doom/?sh=5b7f2ef53cfc> [<https://perma.cc/WAG2-KW62>].

168. Associated Press, *Amy Coney Barrett was trustee at private school with anti-LGBTQ policies*, PBS (Oct. 21, 2020), <https://www.pbs.org/newshour/politics/amy-coney-barrett-was-trustee-at-private-school-with-anti-gay-policies> [<https://perma.cc/M3DP-YZ5J>].

169. David G. Savage, *Gorsuch's Supreme Court opinion for LGBTQ rights sends a shudder through conservative ranks*, LOS ANGELES TIMES (Jun. 17, 2020), <https://www.latimes.com/politics/story/2020-06-17/gorsuch-supreme-court-opinion-lgbtq-rights-shakes-conservatives> [<https://perma.cc/W4KK-4FS5>]; *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

170. Nina Totenberg, *Justices Thomas, Alito Blast Supreme Court Decision On Same-Sex Marriage Rights*, NPR (Oct. 5, 2020), <https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights> [<https://perma.cc/U96J-357W>].

171. Samantha Schmidt & Emily Wax-Thibodeaux, *How a Biden presidency could advance transgender rights — and lead to backlash*, THE WASHINGTON POST (Nov. 17, 2020), <https://www.washingtonpost.com/dc-md-va/2020/11/17/biden-transgender-rights/> [<https://perma.cc/SQ5K-DVK5>].

individuals.”<sup>172</sup> This reality does not seem far off with President Biden’s recent banning of gender identity and sexual orientation discrimination in federal government and overturning of former President Trump’s ban on transgender people serving in the military.<sup>173</sup> The Equality Act would explicitly include gender identity in the protected class of sex.<sup>174</sup> While the proposed Act does not include explicit provisions about health care access, it would strengthen a claim of discrimination brought under Title VII.<sup>175</sup> With the clinching of the majority in the Senate, Democrats’ control of Congress may lead to an eventual passage of the Equality Act and potential additional legislation aimed at expanding LGBTQ+ rights.<sup>176</sup> The Biden administration has already moved to carve out protections for coverage of gender-affirming care such as those served by the Department of Veterans Affairs.<sup>177</sup>

In addition, the country and world have been forever changed by the COVID-19 pandemic. It has revealed the many shortcomings of the United States healthcare system, such as the lack of adequate health care coverage, the financial vulnerability of healthcare institutions, vast racial and ethnic disparities, and a lack of preparedness for health crises.<sup>178</sup> As a result, federal and state governments are already addressing these shortcomings, and some predict this will lead to even more policy changes that will permanently impact

---

172. BIDEN HARRIS, *The Biden Plan To Advance LGBTQ+ Equality In America And Around The World*, <https://joebiden.com/lgbtq-policy/#> [<https://perma.cc/KJ87-RUJC>].

173. Charlotte Clymer, *Biden’s rejection of Trump’s trans military ban is the beginning, not the end, for LGBTQ rights*, NBC (Jan. 28, 2021), <https://www.nbcnews.com/think/opinion/biden-s-rejection-trump-s-trans-military-ban-beginning-not-ncna1256012> [<https://perma.cc/VMD3-FSLB>].

174. Equality Act, H.R. 5, 116th Cong., § 2, (2019). The Equality Act seeks to expand the definition of nondiscrimination to include sexual orientation and gender identity as distinct protected classes and provide. It also expands what is considered a public accommodation, protects access to spaces based on gender identity, gives the Department of Justice power to intervene in federal equal protection actions, and precludes the use of the Religious Freedom Restoration Act of 1993 as a defense for violating the aforementioned protections. *Id.*

175. *Id.* at § 7.

176. Jim Tankersley & Michael D. Shear, *With Democrats in Control, Biden Moves to Advance Agenda*, THE N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/business/democrats-biden-agenda.html?auth=login-facebook> [<https://perma.cc/NYR5-3N7F>].

177. Meryl Kornfield, *VA plans to offer gender-confirmation surgery to transgender veterans, reversing ban*, THE WASHINGTON POST (Jun. 19, 2021), <https://www.washingtonpost.com/national-security/2021/06/19/veterans-gender-affirmation-surgery/> [<https://perma.cc/DPJ4-FN4B>].

178. David Blumenthal, Elizabeth J. Fowler, Melinda Abrams & Sara R. Collins, *Covid-19 — Implications for the Health Care System*, THE NEW ENGLAND J. OF MED. (Oct. 8, 2020), [https://www.nejm.org/doi/full/10.1056/NEJMs2021088?query=featured\\_home](https://www.nejm.org/doi/full/10.1056/NEJMs2021088?query=featured_home) [<https://perma.cc/HDH8-7QRC>].

the United States healthcare system.<sup>179</sup> Changes might include expanding the Affordable Care Act, closing the Medicaid gap, reducing drug prices, and creating a public health insurance option.<sup>180</sup> Overall, the focus on healthcare will likely only continue to grow and there is bound to be an impact on access to healthcare coverage for transgender and gender-nonconforming individuals.

#### *D. Conclusion*

With the current political climate and an inflated focus on healthcare, there is a good chance there will be a great deal of movement in this area from a legislative perspective, and possibly at the judicial level as well. Additionally, any one of the other federal- or state-level routes may be strengthened or further weakened in the near future as well. Only time will tell when it comes to these possibilities, and even if it seems like the tide is turning one way or another, this issue is extremely susceptible to rapid temperament changes politically and socially. For now, Title VII based on *Bostock*'s interpretation provides transgender and gender-nonconforming individuals the best chance at challenging the denial of employer-sponsored health insurance coverage for gender-affirming medical care.

JENNIFER A. KNACKERT\*

---

179. Julia L. Marcus & Joshua Barocas, *The coronavirus pandemic could transform our health care system — for the better*, STAT (Apr. 14, 2020), <https://www.statnews.com/2020/04/14/coronavirus-pandemic-improve-health-care-system/> [<https://perma.cc/868J-XSJB>].

180. Sarah Kliff & Margot Sanger-Katz, *With New Majority, Here's What Democrats Can (and Can't) Do on Health Care*, THE N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/upshot/biden-democrats-health-plans.html> [<https://perma.cc/AD2V-A9NA>].

\* J.D. candidate at Marquette University Law School ('22) and the Editor in Chief of Vol. 105 of the Marquette Law Review. This Comment is dedicated to a dear friend and colleague, Colleen Mandell (MULS '21), who is an exemplar of advocacy in the face of complacency and ignorance.