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**THE IMPACT OF *BOSTOCK V. CLAYTON COUNTY* ON ACCESS TO
HEALTH CARE FOR LGBTQ PERSONS**

ABSTRACT

*LGBTQ individuals face countless acts of discrimination in health care insurance and delivery. In spite of this inequality, there are zero LGBTQ-inclusive health insurance protections in over half of the United States. Title VII of the Civil Rights Act (Title VII) and Section 1557 of the Patient Protection and Affordable Care Act (ACA) are two federal statutes that prohibit discrimination, in relevant part, on the basis of sex. Both federal statutes have been greatly impacted by the Supreme Court decision in *Bostock v. Clayton County*, which interpreted “sex” in Title VII to include gender identity and sexual orientation. This Article explains how *Bostock* protects LGBTQ persons from discrimination in employer-provided health insurance under Title VII. *Bostock*’s scope extends beyond health insurance and into health care delivery, as demonstrated by its applicability to Section 1557 of the ACA (Section 1557). This Article demonstrates how Section 1557—where its enabling statutes do not include Title VII—should prohibit discrimination regardless of sexual orientation and gender identity. Lastly, this Article emphasizes the importance of state action, for example in public accommodations laws, in the absence of clear and explicit federal LGBTQ protections.*

I. INTRODUCTION

The lives of LGBTQ persons are constantly threatened by discrimination in health care insurance and health care delivery through either delays or denials of medically necessary care.¹ In addition, LGBTQ persons frequently encounter providers who use harsh language, refuse to touch patients, and improperly blame patients for their health status.² LGBTQ persons who experience such discrimination are at risk of avoiding medical help altogether, creating a negative, long-lasting impact on health outcomes.³ Yet, despite these evident disparities, twenty-seven states and four territories have no laws providing LGBTQ-inclusive health insurance protections on the basis of sexual orientation or gender identity, and forty-five percent of LGBTQ individuals live in such states.⁴ Only sixteen states, one territory, and the District of Columbia (D.C.) expressly prohibit such discrimination based on sexual orientation and gender identity,⁵ although such prohibitions have limited application to employer-provided health insurance.⁶ And only twenty-four states and D.C. explicitly prohibit transgender exclusions in health insurance coverage, which are “policies that bar health insurers from explicitly refusing to cover *transgender-related* health care benefits.”⁷

Federal law has long prohibited discrimination in health care insurance and delivery, but whether these laws apply to the LGBTQ community has been controversial and unresolved in any determinative respect. First, Title VII of the

1. Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

2. LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE WITH HIV 10 (2010).

3. Mirza & Rooney, *supra* note 1; *How Discrimination Impacts LGBTQ Healthcare*, ST. CATHERINE U. (Apr. 15, 2021), <https://www.stkate.edu/academics/healthcare-degrees/lgbtq-health-discrimination>; see also Off. of Disease Prevention & Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Mar. 4, 2021) (“Research suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights.”).

4. *Equality Maps: Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Mar. 30, 2022). Arkansas previously refused to provide such insurance protections, raising the number of total states to twenty-eight, but now Arkansas law explicitly allows insurers to refuse to cover gender-affirming care. *Id.*; see H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021). Note a federal judge has issued a temporary injunction, preventing the law from taking effect while litigation is pending. *Brandt v. Rutledge*, No. 4:21CV00450, 2021 WL 3292057, at *7 (E.D. Ark. Aug. 2, 2021).

5. *Equality Maps: Healthcare Laws and Policies*, *supra* note 4.

6. See discussion *infra* Section IV.A.

7. *Equality Maps: Healthcare Laws and Policies*, *supra* note 4 (emphasis added).

Civil Rights Act (Title VII) prohibits discrimination in employee benefits, including health insurance,⁸ but until the Supreme Court ruling in *Bostock v. Clayton County*, it was not clear whether this prohibition covered health benefits needed by LGBTQ persons. Second, Section 1557 of the Patient Protection and Affordable Care Act (ACA)⁹ prohibits both health care providers (i.e., delivery) and insurance companies (i.e., coverage) from engaging in discrimination based on sex.¹⁰ Whether, however, this provision applies to LGBTQ status and gender identity has been a matter of great contention.¹¹ *Bostock* provides a resolution to this controversy.

In a six-to-three decision, the Supreme Court in *Bostock* held that an employer who fires an individual merely for being gay or transgender violates the sex discrimination prohibition under only Title VII.¹² Justice Neil M. Gorsuch, writing for the majority, interprets the term “sex,” in the context of employment under Title VII, to include sexual orientation and gender identity.¹³ Because Title VII applies to employer-provided health insurance, *Bostock*’s interpretation of “sex” extends to employee health benefits.¹⁴ This is significant for the nearly fifty percent of the population who receive health insurance coverage through their employment.¹⁵ And although so many employees are excluded from *Bostock*’s protections within Title VII, its impact extends more broadly because of its application to the interpretation of Section 1557 of the ACA (Section 1557).¹⁶

Section 1557 prohibits discrimination in health insurance more broadly than insurance provided by employers under Title VII. An individual shall not “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including *contracts of insurance*.”¹⁷ The

8. See discussion *infra* Section III.A.

9. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116).

10. 42 U.S.C. § 18116(a); Mirza & Rooney, *supra* note 1.

11. See discussion *infra* Parts V and VI.

12. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1736–37, 1754 (2020).

13. *Id.* at 1736–37.

14. 42 U.S.C. § 2000e–2(a)(1); see Katharine Marshall & Kaye Pestaina, *Justices’ Title VII Ruling on LGBTQ Bias Has Health Benefit Impacts*, MERCER (June 15, 2020), <https://www.mercer.com/our-thinking/law-and-policy-group/justices-title-vii-ruling-on-lgbtq-bias-has-health-benefit-impacts.html>.

15. *Health Insurance Coverage of the Total Population*, KAISER FAM. FOUND. (2019), <https://www.kff.org/other/state-indicator/total-population/?dataView=1¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (Select “Percent” in the data view table.).

16. See discussion *infra* Part VI.

17. 42 U.S.C. § 18116(a) (emphasis added); see Brietta R. Clark, Elizabeth Pendo & Gabriella Garbero, *Sex-Based Discrimination in Healthcare Under Section 1557: The New Final Rule and*

statute also prohibits discrimination in health care delivery.¹⁸ For entities mostly engaged in the business of health care that receive federal funding, Section 1557 applies to their entire operation, e.g., health care delivery and financing.¹⁹ This includes most providers that take Medicare and Medicaid, such as hospitals and community health centers.²⁰

Although Section 1557 prohibits discrimination in health insurance and health care delivery on the basis of “sex,” whether that prohibition extends to LGBTQ status has been the subject of great controversy and of contradictory administrative regulations issued by the Obama and Trump administrations. The Obama administration promulgated regulations (2016 Final Rule) that included sex stereotyping and gender identity in the definition of “sex.”²¹ The Trump administration rescinded the Obama-era regulations and promulgated new regulations (2020 Final Rule) that omit gender identity and sex stereotyping from the definition of “sex.”²² Following this, in January 2021, Joseph R. Biden, Jr. signed Executive Order 13,988 (EO 13,988), which directs all federal agencies that enforce statutes prohibiting discrimination on the basis of sex to review and ascertain whether *Bostock* impacts those regulations.²³ Because the language used in Title VII is *identical* to the language used in Section 1557,²⁴ *Bostock* should be applied to interpret Section 1557 as prohibiting sex discrimination based on gender identity and transgender status.

This Article demonstrates how *Bostock* applies to protect against LGBTQ discrimination in employer-provided health insurance under Title VII. Because *Bostock* interprets “sex” in Title VII to include gender identity and sexual

Supreme Court Developments, A.B.A. HEALTH LAW., Oct. 2020, at 5–6 (examining the regulatory and litigation landscape for defining and enforcing Section 1557 of the ACA’s prohibition on sex discrimination in health care); Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 HOWARD L.J. 855, 859–60, 872–73 (2012) (discussing the impact of Section 1557 on equitable access to health insurance and health care across racial lines).

18. 42 U.S.C. § 18116(a).

19. *Id.*

20. Off. for C.R., *Section 1557: Frequently Asked Questions*, HHS.GOV, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html> (last updated May 18, 2017).

21. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,387 (May 18, 2016) (codified at 45 C.F.R. pt. 92). Gender identity includes both gender expression and transgender status. *Id.* at 31,388.

22. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,160–62 (June 19, 2020) (to be codified at 42 C.F.R. pt. 438, 440, 460 and 45 C.F.R. pt. 86, 92, 147, 155, 156). As a result of these omissions, litigation is pending. *See* Complaint for Declaratory & Injunctive Relief at 3, 7, *Whitman-Walker Clinic, Inc. v. U.S. DHHS*, No. 1:20-cv-01630 (D.D.C. June 22, 2020); Complaint at 1, 6, *Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. DHHS*, No. 1:20-cv-11297 (D. Mass. July 9, 2020).

23. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021).

24. *See* discussion *infra* Section VI.A.

orientation and Title VII prohibits discrimination in employee benefits on the basis of sex, employers cannot discriminate on the basis of gender identity or sexual orientation in health benefits plans. As a result, employer-provided health insurance must incorporate LGBTQ protections and coverage to assure that they are in compliance with Title VII.

This Article also argues that Section 1557, which prohibits discrimination on the basis of “sex” in both health insurance and health care delivery that fall within the bounds of this statute, should be interpreted to include a prohibition against discrimination against LGBTQ persons (i.e., sexual orientation and gender identity). Although *Bostock* does not interpret Section 1557, the majority opinion’s broad approach to interpreting Title VII should be applied to Section 1557 and others like it.

This Article further points out the significance of states incorporating sexual orientation and gender identity in their public accommodations law.²⁵ *Bostock*—which interpreted a federal statute—does not extend protections to LGBTQ persons in places of public accommodation, as controlled by federal law. This is because federal public accommodations law does not explicitly prohibit “sex” discrimination, which is precisely what *Bostock* impacts. As a result, states must take action to protect LGBTQ persons in public spaces, like hospitals, doctors’ offices, and other public health care entities.

First, Part II provides an overview of *Bostock*’s majority and dissenting opinions, as well as Justice Gorsuch’s textualist approach to interpreting Title VII. Next, Part III examines the most common health benefit supplied by employers—health insurance—under Title VII. Part IV then discusses how employers might assure LGBTQ protections within health coverage benefits under Title VII, illustrated by an employer assessment tool and recent responses in state law. Part V briefly describes how the Obama and Trump administrations each issued regulations to implement Section 1557’s nondiscrimination provision, with the Obama administration including gender identity/sex stereotyping within the definition of “sex” under the statute and the Trump administration excluding it. Part VI further examines the influence of *Bostock* on health care by applying *Bostock*’s approach to statutory interpretation of the term “sex” to Section 1557. This Part argues that President Trump’s 2020 Final Rule must be rejected as inconsistent with the statute and argues that the review mandated by EO 13,988 must conclude that Section 1557’s prohibition of discrimination based on sex includes sexual orientation and gender identity. Lastly, Part VII demonstrates the importance of *state* public accommodations laws to prohibit discrimination on the basis of sexual orientation and gender identity in public health care spaces.

25. See discussion *infra* Part VII.

II. OVERVIEW OF *BOSTOCK*A. *The Consolidation of Three Cases*²⁶

Bostock consolidates three separate cases that all address discrimination on the basis of sex under Title VII. The first plaintiff, Gerald Bostock, worked as a child welfare advocate for Clayton County, Georgia, where the county won several national awards under his management.²⁷ Despite Mr. Bostock's accomplishments, he was fired for conduct "unbecoming" a county employee shortly after participating in a gay recreational softball league.²⁸ The second plaintiff, Donald Zarda, was employed by Altitude Express in New York as a skydiving instructor.²⁹ Despite working for the company for several years, Mr. Zarda was fired days after mentioning that he was gay.³⁰ The last plaintiff, Aimee Stephens, worked at R. G. & G. R. Harris Funeral Homes in Michigan, where she initially presented herself as a male.³¹ In her sixth year with the company, however, Ms. Stephens decided to "live and work full-time as a woman," particularly after clinicians diagnosed her with gender dysphoria and advised that she live as a woman.³² Following this, the funeral home fired Ms. Stephens.³³

In each of these cases, an employer allegedly fired an employee simply for being homosexual or transgender, causing each employee to sue, alleging "unlawful discrimination on the basis of sex" under Title VII.³⁴ Lower courts were unable to come to a consistent conclusion; the Eleventh Circuit held that Title VII "does not prohibit employers from firing employees for being gay," while the Second and Sixth Circuits held that sexual orientation and transgender status, respectively, are protected under Title VII's sex discrimination prohibition.³⁵

B. *Case Holding*

Justice Gorsuch delivered the opinion of the Court, in which Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. The majority held: "An employer violates Title VII when it intentionally fires an

26. *Bostock v. Clayton County* was consolidated with *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*.

27. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

28. *Id.* at 1737–38.

29. *Id.* at 1738.

30. *Id.*

31. *Id.*

32. *Bostock*, 140 S. Ct. at 1738.

33. *Id.*

34. *Id.*

35. *Id.*

individual employee based in part on sex.”³⁶ A statutory violation occurs whether or not other factors besides an individual’s “sex” exists in relation to the employer’s actions.³⁷ It is impossible to discriminate against an individual for being either homosexual or transgender without discriminating on the basis of sex,³⁸ because the first cannot happen without the second. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, Title VII is violated when an employee suffers from intentional discrimination because of such identities.³⁹

C. Dissenting Views

Justice Alito filed a dissenting opinion, in which Justice Thomas joined, while Justice Kavanaugh filed a separate dissenting opinion. Justice Alito opened his dissent by criticizing the majority opinion: “There is only one word for what the Court has done today: legislation.”⁴⁰ In Justice Alito’s views, the opinion does not merely enforce the terms of the statute, but rather takes on a new approach of updating old statutes so that they “better reflect the current values of society.”⁴¹ Justice Alito also emphasizes that the question in *Bostock* is not whether discrimination because of sexual orientation or gender identity *should* be outlawed, but *whether Congress did that in 1964*; to him, “it indisputably did not.”⁴² Interestingly, Justice Alito notes that this Court’s holding may intensify the debate on health benefits since “[t]ransgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover . . . sex reassignment surgery,” and similar claims have been brought under the ACA.⁴³ Further, Justice Kavanaugh’s dissent largely agrees with Justice Alito’s and argues that the Court majority is acting in a legislative capacity: under the Constitution’s separation of powers, “it was Congress’s role, not this Court’s, to amend Title VII.”⁴⁴

36. *Id.* at 1741.

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

38. *Id.* For example, consider two employees—one, female and the other, male—who are both attracted to men and are materially identical in the employer’s mind, but only the male employee is fired for no reason except for his sexuality. *Id.* Consider an employer who fires a transgender person who identified as a male at birth but now identifies as a female, despite retaining an identical employee who identified as female at birth. *Id.* In both cases, the employer is intentionally discriminating on the basis of sex against an employee that is otherwise tolerated in another. *Id.*

39. *Id.* at 1743.

40. *Id.* at 1754 (Alito, S., dissenting).

41. *Id.* at 1755–56 (Alito, S., dissenting).

42. *Bostock*, 140 S. Ct. at 1756 (Alito, S., dissenting).

43. *Id.* at 1781 (Alito, S., dissenting).

44. *Id.* at 1837 (Kavanaugh, B., dissenting).

D. Justice Gorsuch's Textualist Approach

The late Justice Scalia sought to derive statutory interpretation from their words alone and to ignore unenacted context, a theory termed “New Textualism.”⁴⁵ Influenced by Justice Scalia, Justice Gorsuch determined the ordinary meaning of Title VII by examining key statutory terms, assessing their impact on the consolidated cases, and using Supreme Court precedent.⁴⁶ Notably, Justice Gorsuch did not rely on legislative history or previous agency decisions or guidance.⁴⁷ Rather, Justice Gorsuch primarily relied on the language of the statute or, in other words, the ordinary meaning of the text,⁴⁸ which is now shown as a possible advocacy tool for disparate treatment⁴⁹ cases under Title VII. In fact, throughout the opinion, Justice Gorsuch emphasized that he was following the text and nothing more.⁵⁰ And even though the outcome of *Bostock* may be contrary to the intention of Title VII’s drafters, Justice Gorsuch provides the following rationale for employing textualism:

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law[.]⁵¹

45. Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3, 6–7 (2020).

46. *Bostock*, 140 S. Ct. at 1738.

47. An example of an agency is the Equal Employment Opportunity Commission (EEOC), which provides guidance on Title VII. See discussion *infra* Part IV (explaining how the EEOC evaluates sex-based discrimination charges against an employer’s health benefit plan by applying either the coverage analysis or the disparate impact analysis).

48. *Bostock*, 140 S. Ct. at 1739–42 (illustrating sex as a “but-for” cause through multiple hypotheticals).

49. Disparate treatment is intentional discrimination toward an individual. As a result of Justice Gorsuch’s opinion, sex—a protected characteristic—includes sexual orientation and gender identity. As shown in *Bostock*, employees with such characteristics are considered “protected classes” and have a claim under Title VII if they can show an employer’s conduct constituted disparate treatment based on their protected characteristic (e.g., sexual orientation and/or gender identity).

50. *Bostock*, 140 S. Ct. at 1749. For example, Gorsuch notes that “the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy.” *Id.* These fail because “[t]his Court has explained many times over many years that, when the meaning of the statute’s terms is plain, [their] job is at an end.” *Id.*

51. *Id.* at 1737.

Despite Justice Gorsuch's method already producing substantial commentary on its strengths and weaknesses,⁵² discussions or critiques of such methodology are outside the scope of this Article.

III. EMPLOYER-PROVIDED INSURANCE UNDER TITLE VII AND THE EEOC

A. Title VII

For employers with fifteen or more employees, Title VII makes it “unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”⁵³ Title VII forbids discrimination in any aspect of employment, including: hiring and firing; compensation or classification of employees; promotion or layoff; marketing; trainings; retirement; disability leave; or other terms and conditions of employment.⁵⁴ Title VII's inclusion of “terms and conditions” indicates that employer-sponsored health benefits are covered under Title VII, given that health insurance is typically included as part of the employment contract.⁵⁵ According to the Kaiser Family Foundation, about 158,000,000 people (or about 49.6% of the U.S. population) receive employer-provided health insurance coverage.⁵⁶

There has been disagreement on whether Title VII protects LGBTQ workers against discrimination—that is, until *Bostock*. The Court, however, had previously held that employment discrimination based on *sexual stereotypes* violates Title VII⁵⁷ and held that an individual can file a same-sex sexual harassment claim under Title VII.⁵⁸ In fact, these cases have been used to argue that “sex” under Title VII reaches gender identity and transgender status.⁵⁹

52. See, e.g., Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC'Y REV. 158, 158 (2020); Hunter Poindexter, *A Textualist's Dream: Reviewing Justice Gorsuch's Opinion in Bostock v. Clayton County*, U. CIN. L. REV. (June 23, 2020), <https://uclawreview.org/2020/06/23/a-textualists-dream-reviewing-justice-gorsuchs-opinion-in-bostock-v-clayton-county/>; Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. (forthcoming 2022).

53. 42 U.S.C. § 2000e-2(a)(1).

54. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers> (last updated Nov. 21, 2009).

55. Marshall & Pestaina, *supra* note 14.

56. *Health Insurance Coverage of the Total Population*, *supra* note 15.

57. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

58. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

59. See *Macy v. Holder*, Appeal No. 0120120821, Agency No. ATF-2011-00751 (EEOC Apr. 20, 2012); *Baldwin v. Foxx*, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (EEOC July 15, 2015). *Bostock* is consistent with this line of EEOC opinions on the term “sex” in

B. *Equal Employment Opportunity Commission*

Established by Congress and the Civil Rights Act, the Equal Employment Opportunity Commission (EEOC) is an independent enforcement agency that has the authority to receive, initiate, and investigate discrimination charges filed against employers covered by Title VII.⁶⁰ Additionally, the EEOC has the authority to provide interpretative guidance on Title VII.⁶¹ EEOC guidance on health insurance states that an employer must “non-discriminatorily provide to all similarly situated employees the same opportunity to enroll in any health plans it offers.”⁶² As a result of Title VII and EEOC guidance, an employer must also ensure that the *terms* of its health benefits are non-discriminatory.⁶³ For the protected category “sex,” the EEOC has long taken the position that LGBTQ discrimination is sex discrimination prohibited by Title VII, as now supported by *Bostock*.⁶⁴

IV. IMPACT OF *BOSTOCK* ON EMPLOYER-PROVIDED INSURANCE UNDER TITLE VII

Bostock is not the first time a Supreme Court decision has successfully impacted employer-sponsored health care plan requirements.⁶⁵ Although *Bostock* does not resolve or even address what constitutes a discriminatory coverage decision within a health benefits plan, the decision includes LGBTQ status and gender identity in the conversation of sex-based discrimination and discusses the need to safeguard protections against such discrimination within employment. Thus, *Bostock* holds heavy implications for employee health benefit plans. As indicated by law firms, employers should “review employee

Title VII. *But see, e.g.,* Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100, 107–08, 131–32 (2d Cir. 2018); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006). For a discussion of Title VII’s definitions of sex, see Lisa J. Banks & Hannah Alejandro, *Changing Definitions of Sex Under Title VII*, 32 A.B.A. J. LAB. & EMP. L. 25, 25–44 (2016).

60. See 42 U.S.C. § 2000e-4; *Federal Laws Prohibiting Job Discrimination Questions and Answers*, *supra* note 54.

61. See 42 U.S.C. § 2000e-12.

62. See U.S. Equal Emp. Opportunity Comm’n, No. 915.003, EEOC Compliance Manual: Section 3 Employee Benefits (2000), <https://www.eeoc.gov/laws/guidance/section-3-employee-benefits>. This section provides guidance to investigate and analyze issues that “arise with regard to life and health insurance benefits, long-term and short-term disability benefits, severance benefits, pension or other retirement benefits, and early retirement incentives.” *Id.*

63. *Id.*

64. See *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal-sector/facts-about-discrimination-federal-government-employment-based-marital-status> (last visited Mar. 30, 2022).

65. For examples, see Marshall & Pestaina, *supra* note 14 (discussing the Pregnancy Discrimination Act and *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983)).

benefit plan documents and policies to identify and avoid potential issues of sex-based discrimination under Title VII.”⁶⁶ One example, as advised by Mercer Law and Policy Group, is “review[ing] the need for gender assignment as an identifier in benefit plan administration.”⁶⁷

Additionally, the EEOC itself provides guidance on how it evaluates sex-based discrimination charges against an employer’s health benefit plan. The two central principles applied in the evaluation are the analysis of coverage and disparate impact.⁶⁸ Employers are advised to evaluate their health benefit plans using these two principles, and ask themselves (1) whether differences in coverage plans between men and women are justified (as in the risk insured against is *not* mutually contractible—which means “where the underlying condition affects, or the treatment/test is available to, both men and women”) and (2) whether their standard to deny insurance coverage disproportionately affects members of a protected group.⁶⁹ This guidance, however, does not have the force and effect of law and is not meant to bind the public.⁷⁰ So, excluding the limited and restricted guidance offered by the EEOC,⁷¹ there is no specific regulatory list of items or categories that must be covered in order to avoid the risk of sex discrimination under Title VII or under *Bostock*. The Society for Human Resource Management, nevertheless, attempts to resolve this ambiguity by consolidating advice from law firms, policy groups, and human resource experts.⁷² Table 1 below provides guidance for employers on how to identify

66. Tripp VanderWal & Brett N. Liefbroer, *Employee Benefit Plans Must Consider Sexual Orientation and Gender Identity Issues After Bostock*, MILLER JOHNSON ATT’YS (Sept. 2, 2020), <https://millerjohnson.com/publication/employee-benefit-plans-must-consider-sexual-orientation-and-gender-identity-issues-after-bostock/>; see, e.g., Brian McGinnis, *After ‘Bostock’: Practical Implications for LGBTQ+ Employees in the Workplace*, FOX ROTHSCHILD LLP (Oct. 28, 2020), <https://www.foxrothschild.com/publications/after-bostock-practical-implications-for-lgbtq-employees-in-the-workplace>.

67. Marshall & Pestaina, *supra* note 14. For example, it is prohibited to deny a transgender woman coverage for a “prostate exam.”

68. See U.S. Equal Emp. Opportunity Comm’n, *supra* note 62. Coverage analysis: employer cannot provide different coverage to men and women where the risk insured against is mutually contractible—that is, where the underlying condition affects, or the treatment/test is available to, both men and women. *Id.* Disparate impact analysis: if the employer applies facially neutral standards to exclude treatment for conditions or risks that disproportionately affect either men or women, or employees on the basis of any other protected classification under the EEO laws, the employer must show that the standards are based on generally accepted medical criteria. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Stephen Miller, *3 Checklists for Avoiding LGBTQ Discrimination in Your Benefits Programs*, SOC’Y HUM. RES. MGMT. (June 30, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/3-checklists-for-avoiding-lgbtq-discrimination-in-your-benefit-programs.aspx>; see also Marshall & Pestaina, *supra* note 14 (discussing the need to obtain expert advice

and fix discriminatory language and practices, which in turn reduces the likelihood of lawsuits under Title VII that ensure sex-based (e.g., sexual orientation and transgender status) protections for employees. These three checklists can be used to ensure fair treatment for all employees, regardless of sexual orientation or gender identity.

Table 1 – Employer Checklists to Identify and Correct Discriminatory Practices ⁷³			
	# 1 – Review Benefits Plans ⁷⁴	# 2 – Amend Discriminatory Policies ⁷⁵	# 3 – Look Broadly for Bias ⁷⁶
1	Review group health plan coverage for same-sex spouses, services related to gender dysphoria, and gender-affirmation surgeries.	Does not cover treatment for gender dysphoria or gender-affirmation surgeries in the group health plan. The Religious Freedom Restoration Act might allow an exemption for religious employers.	Ensure compliance with ongoing contracting requirements prohibiting LGBTQ discrimination if you're a federal contractor or subcontractor.
2	Review your health plan's provider network to ensure reasonable access to providers with expertise in LGBTQ health care. Consider creating a provider directory.	Does not provide medically necessary mental health benefits, hormone therapy, and some level of gender-affirmation surgical benefits for transgender employees.	Review benefit administration gender-assignment requirements, and consider options for more inclusive descriptors, considering applicable federal/state laws.

regarding employer health coverage issues after *Bostock* and providing suggestions for employers to ensure compliance).

73. The information in Table 1 was gathered from the consolidated advice of law firms, policy groups, and human resource experts. Miller, *supra* note 72; Marshall & Pestaina, *supra* note 14.

74. This column encourages employers to conduct a general review of their plans.

75. This column alerts employers to red flags in their benefits program.

76. This column highlights the importance of employers keeping not only Title VII in mind when conducting evaluations on health coverage, but also other federal and state laws protecting the LGBTQ community.

3	Determine whether disability plan coverage includes temporary disability due to gender-affirmation surgery.	Does not provide disability benefits for short- or long-term disability due to gender dysphoria or gender-affirmation surgeries.	Review disability plan coverage for temporary disability due to gender-affirmation surgeries, considering applicable federal/state laws.
4	Consider expanding family planning benefits (within the group health plan or external) to include LGBTQ employees (e.g., adoption assistance, foster care, reproductive technology assistance).	Does not cover family planning benefits for LGBTQ employees if family planning benefits are covered for opposite-sex couples.	Consider Mental Health Parity and Addiction Equity Act compliance challenges. Putting limits on behavioral health treatments for gender dysphoria may violate the law if they are not on par with the limits on medical and surgical benefits.
5	Review employee assistance programs and related services to ensure adequate coverage for the specific needs of LGBTQ employees.	Provides coverage to opposite-sex spouses, or domestic partners, but not same-sex spouses, or domestic partners, or vice versa.	For employers receiving federal funding for their health plans or other health activities, follow developments in Section 1557 nondiscrimination guidance.

A. *States Responding to Bostock: New York, Wisconsin, Michigan, Washington*

The Supreme Court’s decision in *Bostock* is impacting actions among the states too, as states are using *Bostock* to interpret their own statutes and regulations. On June 28, 2020, for example, the New York Department of Financial Services (DFS) issued Insurance Circular Letter No. 13 (Letter No. 13), which confirmed the prohibition of discrimination “based on sexual orientation, gender identity or expression, and transgender status in relation to insurance.”⁷⁷ The purpose of Letter No. 13 is to remind health insurers (and other types of insurers) “of the requirements related to non-discrimination

77. LISETTE JOHNSON, N.Y. STATE DEP’T OF FIN. SERVS., INSURANCE CIRCULAR LETTER NO. 13 (June 28, 2020), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2020_13.

protections.”⁷⁸ Additionally, Letter No. 13 was published in response to the federal government’s action under the Trump administration in removing “protections prohibiting discrimination based on sexual orientation, gender identity or expression, or transgender status.”⁷⁹ Recently, the DFS adopted a regulation that states “an issuer shall not discriminate based on an insured’s or prospective insured’s actual or perceived sexual orientation, gender identity or expression, or transgender status”—which applies to “individual, small group, and large group . . . health insurance policies and contracts that provide hospital, surgical, or medical expense coverage,” and student health insurance policies.⁸⁰ This regulation also prohibits exclusions for “treatments related to gender transition, gender dysphoria, or gender incongruence”; thus, DFS will not only deny such language that appears to exclude these treatments but also take action for failure to adhere to these laws and regulations.⁸¹

On June 29, 2020, the Office of the Commissioner of Insurance in the State of Wisconsin (OCI) issued a bulletin in response to *Bostock* detailing the legal requirements regarding sex discrimination in their Wisconsin-affiliated health insurance policies.⁸² The OCI bulletin asserts that it is unlawful to discriminate by excluding, limiting or denying “benefits to an insured on the basis of the insured’s gender identity” and further mandates that all insurers—in both the private and public sectors—and “self-funded non-federal governmental plans [must fully] comply with state insurance laws for policies currently in effect.”⁸³ As a result, OCI states it will not accept any filings from health insurers that “contain exclusions or limitations on benefits that are based on a person’s gender identity”⁸⁴—which is similar to DFS’s policy in New York.

On August 11, 2020, the Michigan Department of Insurance and Financial Services (DIFS) issued Bulletin 2020-34-INS (Bulletin), which confirmed that it, like *Bostock*, interprets “sex” in “all statutes and rules [under its

78. *Id.*

79. *Id.* See Part V for a more thorough regulatory analysis of such action administered by President Trump.

80. *Id.* Regulation states an issuer may not deny a “procedure to treat gender dysphoria on the basis that such procedure is deemed always cosmetic or experimental . . . without conducting an internal review and providing external appeal rights.” *Id.*

81. JOHNSON, *supra* note 77.

82. MARK V. AFABLE, WIS. OFF. OF THE COMM’R OF INS., NONDISCRIMINATION REGARDING COVERAGE FOR INSUREDS WHO ARE TRANSGENDER OR GENDER DYSPHORIC (June 29, 2020), <https://oci.wi.gov/Documents/Regulation/Bulletin20200629Nondiscrimination.pdf>.

83. *Id.*; see *Press Release, June 29, 2020 Wisconsin Insurance Commissioner Says Health Insurance Discrimination on the Basis of Gender Identity is Illegal*, WISCONSIN.GOV (June 29, 2020), <https://oci.wi.gov/Pages/PressReleases/20200629GenderIdentityDiscrimination.aspx> (“While OCI handled cases on an individual basis, Commissioner Afable took the measure of issuing today’s bulletin to ensure all Wisconsinites understand the protections afforded to them under the law” because each “person deserves fair and equal access to health care[.]”).

84. AFABLE, *supra* note 82.

administration] to include sexual orientation and gender identity.”⁸⁵ Fully insured group health plans are “required to comply with the statutes and rules administered by DIFS.”⁸⁶ Self-funded group health plans, however, are “not required to comply with the statutes and rules because of ERISA preemption.”⁸⁷ Despite this, these plans must still take into account the effects of *Bostock* in “certain plan design decisions.”⁸⁸ Additionally, ERISA’s preemptive effects threaten “to thwart many state efforts at health reform [as seen here with Michigan] and to limit the scope of state health reform insofar as they would affect employee health benefit plans.”⁸⁹ ERISA *only* applies to employer-provided insurance;⁹⁰ but because ERISA also exempts Title VII requirements from its broad preemptive authority,⁹¹ *Bostock* applies more broadly than this state initiative and other initiatives.

The State of Washington is unique in that it established LGBTQ protections before *Bostock* was decided but expanded upon these protections afterwards and focused on specific obstacles to gender-affirming care. On May 12, 2021, Washington enacted a new law that requires compliance from individual and small group health insurance plans issued on and after January 1, 2022.⁹² These plans cannot “deny or limit coverage for gender-affirming treatment when it is medically necessary and prescribed by a medical professional” and cannot “apply categorical cosmetic or blanket exclusions to gender-affirming treatment.”⁹³ Additionally, Washington, unlike other states, explicitly lists services that insurers can no longer categorically exclude: facial feminization, tracheal shaves, hair electrolysis, mastectomies, breast reductions, breast

85. ANITA G. FOX, STATE OF MICH. DEP’T OF INS. & FIN. SERVS., BULLETIN 2020-34-INS (Aug. 11, 2020), https://www.michigan.gov/documents/difs/Bulletin_2020-34-INS_699016_7.pdf; VanderWal & Liefbroer, *supra* note 66.

86. VanderWal & Liefbroer, *supra* note 66.

87. *Id.* Although state insurance regulation can be saved from ERISA preemption, an exception is created for state laws that relate to self-funded group health plans, because they are not deemed to be in the business of insurance. See BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 438 (8th ed. 2018) for an in-depth discussion of ERISA preemption. Much gratitude to the SLU Law professors who contributed to this textbook, including Thomas L. Greaney, Sandra H. Johnson, Robert Gatter, and Elizabeth Pendo.

88. VanderWal & Liefbroer, *supra* note 66.

89. FURROW ET AL., *supra* note 87, at 462.

90. *Id.* at 436.

91. See Jacob Mattinson & Judith Wethall, *LGBTQ Title VII Ruling May Impact Your Employee Benefit Plan*, NAT’L L. REV. (June 22, 2020), <https://www.natlawreview.com/article/lgbtq-title-vii-ruling-may-impact-your-employee-benefit-plan>.

92. *Washington, Feds Take Action to Solidify Insurance Protections for Transgender People*, OFF. INS. COMM’R, WASH. STATE (May 12, 2021), <https://www.insurance.wa.gov/news/washington-feds-take-action-solidify-insurance-protections-transgender-people>; S.B. 5313, 67th Leg., Reg. Sess. (Wash. 2021) (codified at WASH. REV. CODE § 48.43.0128 (2021)).

93. *Washington, Feds Take Action to Solidify Insurance Protections for Transgender People*, *supra* note 92; S.B. 5313, 67th Leg., Reg. Sess. (Wash. 2021).

implants or any combination of gender-affirming procedures, including revisions to prior treatment.⁹⁴ This law effectively prohibits insurers from behaving discriminatorily towards patients because of their gender identity.

Although some states are restricting medical care for LGBTQ youth, others may decide to follow New York, Wisconsin, Michigan, and Washington's approach in affirming *Bostock*'s definition of sex within all state statutes and rules. These state agencies' interpretation of their statutes and regulations can inform the analysis used to determine what suffices as discriminatory actions in certain situations and, as a result, can be fairly susceptible to litigation challenges.

V. OVERVIEW OF SECTION 1557

On March 23, 2010, the ACA was enacted, and with it came Section 1557, which prohibits discrimination in certain health programs or activities—including providers, hospitals, and medical systems—that receive federal financial assistance.⁹⁵ Section 1557 incorporates protections from four existing civil rights laws: Title VI of the Civil Rights Act of 1964 (Title VI) (race, color, national origin), Title IX of the Education Amendments of 1972 (Title IX) (sex), the Age Discrimination Act of 1975 (Age Discrimination Act) (age), and Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. § 794 (Section 504) (disability).⁹⁶ The language of Section 1557 specifically states that Title VI, Title IX, the Age Discrimination Act, and Section 504 should be used as sources for interpretation and enforcement mechanisms of Section 1557—notably excluding Title VII.⁹⁷ The administrative regulations that implement and interpret the ACA can vary by administration. For example, the inclusion of the term “sex” in Section 1557 stems from Title IX and is as follows: “No person . . . shall, on the basis of sex, . . . be subjected to discrimination.”⁹⁸ With this, the Obama and Trump administrations have interpreted “sex” quite differently. The interpretation of the term “sex” has been a matter of significant controversy.

On May 18, 2016, the Obama administration promulgated regulations to specifically include “gender identity” and “sex-stereotyping” in its definition of

94. S.B. 5313, 67th Leg., Reg. Sess. (Wash. 2021); WASH. REV. CODE § 48.43.0128 (2021).

95. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119, 119, 260; Marshall & Pestaina, *supra* note 14. Note that most providers, hospitals, and medical systems do accept federal financial assistance. See discussion *infra* Part VII.

96. 42 U.S.C. § 18116(a); MaryBeth Musumeci et al., *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAM. FOUND. (Sept. 18, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/>.

97. 42 U.S.C. § 18116(a). Note that Section 504 of the Rehabilitation Act of 1973 is codified as 29 U.S.C. § 794.

98. 20 U.S.C. § 1681(a).

“sex,” which extended the ACA’s non-discrimination protections to transgender and gender nonconforming people.⁹⁹ However, on June 19, 2020, the Trump administration removed these inclusions to revert back to the “original and ordinary public meaning [of sex]”— which is “the biological binary of male and female that human beings share with other mammals.”¹⁰⁰ And although health plans were prohibited from categorically excluding or limiting coverage for health services related to gender transition under President Barack Obama,¹⁰¹ President Donald J. Trump removed this provision as well, rolling back even more LGBTQ protections.¹⁰² As a result, health care providers may be allowed to deny care to those “who are transgender or who do not conform to traditional sex stereotypes,” which may also worsen health disparities among LGBTQ persons.¹⁰³

VI. IMPACT OF *BOSTOCK* ON HEALTH CARE

Section 1557 is one of many examples demonstrating the breadth of *Bostock*’s influence as a result of Justice Gorsuch’s broad approach in statutory interpretation.¹⁰⁴ Because courts traditionally rely on Title VII precedent when interpreting Title IX¹⁰⁵—and Section 1557¹⁰⁶—*Bostock*, which interprets Title VII, challenges the survivability of the 2020 Final Rule and establishes the basis of EO 13,988 and future rulemaking under the Biden administration. Hence,

99. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,387 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

100. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,160, 37,178 (June 19, 2020) (to be codified at 42 C.F.R. 438, 440, 460, 86, 92, 147, 155, 156).

101. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,434–35, 31,471–72.

102. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37,187, 37,196–99.

103. Musumeci et al., *supra* note 96.

104. For a discussion of the impact of *Bostock* in sports and on trans athletes, see Brenna M. Moreno, “*Woman Enough*” to Win? *An Analysis of Sex Testing in College Athletics*, 15 ST. LOUIS U. J. HEALTH L. & POL’Y 509, 509–29 (2022).

105. *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (applying Title VII’s notion of sexual harassment as sex discrimination in a Title IX claim); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002); Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ., 245 F.3d 1172, 1176 (10th Cir. 2001).

106. *See* Prescott v. Rady Childs. Hosp., 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (“Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections.”); *see also* Tovar v. Essentia Health, 342 F. Supp. 3d 947, 953, 957 (D. Minn. 2018) (arguing that Title VII permits sex stereotyping claims—an insurer failing to cover gender reassignment surgery—which informs Section 1557).

Section 1557 prohibits discrimination against LGBTQ persons in health care, which also impacts both health care delivery and access for all such persons.

A. Application of Bostock Under Title VII to Section 1557 Under Title IX

Title VII statutory language is *identical* to Title IX (and thus Section 1557), which *Bostock* effectively applies to, as demonstrated by the following analysis: (1) Title IX is one of Section 1557's enabling statutes; (2) Title IX prohibits discrimination "on the basis of sex";¹⁰⁷ (3) Title VII prohibits discrimination "because of . . . sex";¹⁰⁸ (4) throughout the opinion, Justice Gorsuch substitutes "because of" for "on the basis of," signifying that these two phrases are interchangeable;¹⁰⁹ (5) *Bostock* interprets Title VII to prohibit discrimination "on the basis of" homosexuality or transgender status, of which "homosexuality [or sexual orientation] and transgender status are inextricably bound up with sex";¹¹⁰ (7) therefore, sexual orientation and transgender status are included in the definition of "sex" in not only *Bostock* and, in turn, Title VII, but also under Title IX and Section 1557. Overall, because Title VII's "definition of sex" has consistently informed the "definition of sex" in Title IX, discrimination on the basis of sexual orientation and gender identity is considered sex discrimination under Section 1557 and is therefore prohibited.

B. Rejection of President Trump's 2020 Final Rule

Because EO 13,988 mandates a review using *Bostock* as guidance, the review should conclude that the 2020 Final Rule should be rescinded and replaced with language consistent with *Bostock*. In part because of *Bostock*, two federal district courts have already issued nationwide preliminary injunctions, preventing the Trump administration from implementing parts of the 2020 Final Rule.¹¹¹ Notably, federal courts, both before and after *Bostock*, have determined that sex discrimination under Title IX includes gender identity, and that *Bostock* "has significant implications for the meaning of Title IX's prohibition on sex discrimination"¹¹²—which is precisely the analysis laid out above. As a result, challenges to the 2020 Final Rule will likely be successful because, first, courts

107. 20 U.S.C. § 1681(a).

108. 42 U.S.C. § 2000e-2(a)(1).

109. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737, 1743 (2020).

110. *Id.* at 1742.

111. Musumeci et al., *supra* note 96. First, in *Walker v. Azar*, the Eastern District of New York blocked provisions "excluding sex stereotyping from the definition of sex discrimination" from being implemented. *Id.* However, in *Whitman-Walker Clinic v. HHS, Inc.*, the DC court denied application of the preliminary injunction to "the elimination of the prohibition on categorical coverage exclusions for gender-affirming care." *Id.* This furthers the inconsistencies among insurers of what constitutes discriminatory coverage.

112. *Id.*; *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health and Human Servs.*, 485 F. Supp. 3d 1, 41–42 (D.D.C., 2020).

have previously upheld Section 1557 protections,¹¹³ and, second, courts have already applied *Bostock* in similar LGBTQ contexts despite falling under a different statute.¹¹⁴ Thus, other federal laws and future courts will find it difficult not to interpret sex discrimination as LGBTQ discrimination, and even more so with the execution of EO 13,988.

C. *How Does Bostock Impact Health Care Access for LGBTQ Persons? . . .
New Era of LGBTQ Protections Under President Biden*

The existence of *Bostock* cements the long-term survivability of EO 13,988, its growing application to health care (via Section 1557), and its impact on LGBTQ access to health care. On January 20, 2021, President Biden signed EO 13,988, aimed to prevent and combat discrimination on the basis of gender identity or sexual orientation.¹¹⁵ As a result of the decision in *Bostock*, the Biden administration commits “to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation” and “address overlapping forms of discrimination.”¹¹⁶ President Biden claims that under *Bostock*’s reasoning, laws and their respective promulgated rules and regulations that prohibit sex discrimination—including Title IX (and thus Section 1557)—“prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”¹¹⁷ Discrimination *solely* on the basis of sexual orientation was not included in the definition of “sex” in either the 2016 or 2020 rules,¹¹⁸ yet

113. Wayne Turner, *Health Insurers Should be Wary of Trump Regulatory Rollback*, NAT’L HEALTH L. PROGRAM (Aug. 6, 2020), <https://healthlaw.org/health-insurers-should-be-wary-of-trump-regulatory-rollback/>. The federal district court held that “Section 1557 protections against sex discrimination include gender identity, and invalidated Medicaid coverage exclusions for gender affirming care,” despite falling under the protection of a different statute. *Id.* (discussing the decision in *Flack v. Wisconsin Department of Social Services*, No. 3:18-cv-00309-wmc (W.D. Wis. 2019)).

114. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–20 (4th Cir. 2020) (discussing that *Bostock* “guides [the court’s] evaluation of claims under Title IX”); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1304–05 (11th Cir. 2020), *vacated*, 3 F.4th 1299 (2021), *reh’g granted*, 9 F.4th 1369 (2021). Both cases applied *Bostock* under Title IX, finding that prohibition on sex discrimination protects transgender students. *See, e.g.*, *Koenke v. Saint Joseph’s Univ.*, No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021) (finding “Defendant’s argument that sexual orientation is not a protected class under Title IX is without merit” because of the Supreme Court’s holding in *Bostock*); *Doe v. Univ. of Scranton*, No. 3:19–CV–01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020) (listing cases from sister circuits that have applied *Bostock* to sexual orientation discrimination claims under Title IX).

115. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021).

116. *Id.*

117. *Id.*

118. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,390 (May 18, 2016) (codified at 45 C.F.R. pt. 92). In 2016, the Office of Civil Rights (OCR) decided not to

President Biden includes sexual orientation as a prohibited form of sex-based discrimination precisely because of *Bostock*.¹¹⁹ EO 13,988 instructs the head of each agency to consider “whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy” discussed above and “whether there are additional actions that the agency should take to ensure that it is fully implementing the policy” discussed above.¹²⁰ Thus, Xavier Becerra—current Secretary of the Department of Health and Human Services (HHS)—is expected to rescind the 2020 Final Rule and promulgate new rules that align with *Bostock*. But the Biden administration failed to provide a specific timeline for issuing a proposed rule for Section 1557. In the meantime, however, Secretary Becerra announced that HHS will interpret and enforce Section 1557 prohibition on sex discrimination to include sexual orientation and gender identity as guidance for the Office for Civil Rights (OCR) in managing complaints and investigations.¹²¹ Accepting and investigating complaints will allow OCR to collect data and build an evidentiary record that can be used in future rulemaking.

It is important to note what this new HHS interpretation fails to do. First, HHS has not resolved the pending litigation over Section 1557 implementing rules (2016 Final Rule versus 2020 Final Rule). Second, HHS has not provided additional guidance on how to not discriminate on the basis of sexual orientation and gender identity.¹²²

As EO 13,988 states, “people should be able to access healthcare . . . without being subjected to sex discrimination. All people should receive equal treatment under the law, no matter their gender identity or sexual orientation.”¹²³ So, implementing anti-discriminatory policies are “necessary to ensure that LGBTQ

resolve whether discrimination on the basis of an individual’s sexual orientation status *alone* is sex discrimination. Regardless, in 2020, OCR removed all relevant provisions.

119. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021).

120. *Id.* at 7024.

121. Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984, 27,984–85 (May 25, 2021). Acting OCR Director Robinsue Frohboese affirmed that “OCR will follow Supreme Court precedent [*Bostock*] and federal law, and ensure that the law’s protections extend to those individuals who are discriminated against based on sexual orientation and gender identity.” *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html> (last updated May 25, 2021).

122. See Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. at 27,984–85 (omitting details regarding what does and does not constitute discriminatory conduct, where the outcome will be decided on a case-by-case basis).

123. Exec. Order No. 13,988, 86 Fed. Reg. at 7023.

individuals can lead long, healthy lives,” and ultimately improve overall LGBTQ health.¹²⁴ LGBTQ persons have a right to be free from discrimination in health care, and EO 13,988, which explicitly relies on *Bostock*, paves the way to enforcing these rights and eliminating barriers in health care.

VII. BEYOND *BOSTOCK*: PROTECTION UNDER STATE PUBLIC ACCOMMODATIONS

As previously discussed, Section 1557 *does* prohibit discrimination by health care facilities that receive federal financial assistance. Examples of federal financial assistance include the following: providers participating in the Children’s Health Insurance Program (CHIP) and other Medicaid programs, hospitals and nursing homes (Medicare Part A), Medicare Advantage Plans (Medicare Part C) (e.g., health maintenance organizations (HMOs) and preferred provider organizations (PPOs)), Prescription Drug Plan sports and Medicare Advantage Drug Plans (Medicare Part D), social service agencies, and insurers participating in the ACA-established Marketplaces (federal and state) and receiving premium tax credits.¹²⁵ Although infrequent, a health care facility may not have to comply with Section 1557’s nondiscriminatory provision if it does not receive *any* federal financial assistance. The lack of mandatory protection against discrimination on the basis of sexual orientation and gender identity in health care may put LGBTQ persons at risk.

Because Title VII does not reach health care facilities in the delivery of care—another critical gap—*Bostock*, while revolutionary, does not extend protections to LGBTQ persons in places of *public* accommodation, such as hospitals, pharmacies, and doctors’ offices. This again becomes especially significant for health care entities who do not have to comply with Section 1557. Places of public accommodations are not impacted because *Bostock* impacts only areas of federal law where sex discrimination is explicitly prohibited. Because the applicable federal statutes (Title II of the Civil Rights Act of 1964¹²⁶ and Title III of the Americans with Disabilities Act of 1990¹²⁷) only cover race, color, religion, national origin, and disability—omitting “sex,”¹²⁸—LGBTQ

124. Off. of Disease Prevention and Health Promotion, *supra* note 3.

125. Off. for C.R., *What Qualifies as “Federal Financial Assistance” for Purposes of Civil Rights Complaints Handled by OCR?*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/faqs/what-qualifies-as-federal-financial-assistance/301/index.html> (last updated Jan. 30, 2022).

126. 42 U.S.C. § 2000a.

127. 42 U.S.C. § 12182.

128. See 42 U.S.C. § 2000a(a) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of *any place of public accommodation* . . . without discrimination on the ground of *race, color, religion, or national origin.*”) (emphasis added); 42 U.S.C. § 12182(a) (“No individual shall be discriminated against *on the basis of disability* in the full and equal enjoyment of the goods, services, facilities, privileges,

persons have no *federal* protections against discrimination in public spaces. But LGBTQ persons may rely on *state* public accommodations laws to enforce their rights if protections are provided.

Places of public accommodation are generally defined as any place of business offering goods, services, facilities, or accommodations to the public.¹²⁹ Places of public accommodation, for example, can include medical providers, hospitals, doctors' offices, pharmacies, and other public health care entities. States can enact public accommodations laws that outlaw discriminatory practices—directly or indirectly refusing, withholding or denying the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations—in a place of public accommodation.¹³⁰ Colorado¹³¹ and New Jersey,¹³² for example, include sex, sexual orientation, gender identity, and gender expression as protected characteristics from discrimination in addition to race, color, religion, national origin, disability, and others.

Contrastingly, Pennsylvania, like many other states,¹³³ failed to codify the prohibition of discrimination on the basis of sexual orientation, gender identity, or gender expression in places of public accommodation.¹³⁴ Despite this, the Pennsylvania Human Relations Commission (PHRC), the enforcement agency of the enabling state statute, released guidance¹³⁵ interpreting the law as banning

advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” (emphasis added).

129. Generally, mosques, synagogues, churches, or any other place that issued for religious reasons are exempted. 42 U.S.C. § 2000a.

130. See, e.g., COLO. REV. STAT. § 24-34-601 (2021); N.J. STAT. ANN. § 10:5-12 (West 2020).

131. COLO. REV. STAT. § 24-34-601 (2021).

132. N.J. STAT. ANN. § 10:5-12 (West 2020). For an example of a fact sheet discussing an individual's rights based on gender identity, see *5 Things You Should Know About Protections from Discrimination or Harassment in Public Accommodations Based on Gender Identity or Expression*, N.J. OFF. ATT'Y GEN., DIV. ON C.R. (Nov. 15, 2019), https://www.nj.gov/oag/dcr/downloads/fact_LGBTQI_Accomm.pdf.

133. Pennsylvania, Alaska, Florida, Kansas, Michigan, North Dakota, and Ohio do not explicitly grant protection on the basis of sexual orientation and/or gender identity, but each state's agency or attorney general has released guidance interpreting “the state's existing protections against sex discrimination to include protections for both sexual orientation and gender identity.” *Local Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Jan. 23, 2022). For more details on the statutes of all fifty states and the District of Columbia, see *State Nondiscrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-nondisc-public-accom.pdf> (last updated Nov. 17, 2021).

134. Amal Bass, *Pennsylvania Needs to Codify LGBTQ+ Protections*, REGUL. REV. (June 23, 2021), <https://www.theregreview.org/2021/06/23/bass-pa-codify-lgbtq-protections/>. Other states include Alaska, Florida, Kansas, Michigan, North Dakota, and Ohio.

135. PA. HUM. RELS. COMM'N, GUIDANCE ON DISCRIMINATION ON THE BASIS OF SEX UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT 1–6 (2021), <https://www.phrc.pa.gov/LegalResources/Policy-and-Law/Documents/Sex%20Discrimination%20Guidance%20PHRA-3-3-2021.pdf>.

“discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.”¹³⁶ This guidance was partially influenced by review of the “evolving case law of interpretations of discrimination ‘because of . . . sex’ under Title VII,” i.e., *Bostock*.¹³⁷ Furthermore, many municipalities have taken the responsibility of incorporating LGBTQ-inclusive language into their ordinances. Philadelphia, for example, added sex, sexual orientation, and gender identity as protected classes.¹³⁸

If a state or city prohibits sex discrimination—including sexual orientation and gender identity—in public accommodations, an LGBTQ resident has the following rights: “right to not to be refused entry, participation, or services because you are transgender or gender nonconforming”; “right to enjoy a business’s services or goods on an equal basis”; “right to dress and present yourself in a manner consistent with your gender identity” without fear of refusal because of someone else’s objection; and “right to be free from harassment.”¹³⁹ Accordingly, state and local laws are critical in ensuring access and providing protection beyond the scope of what is covered in federal law.

VIII. CONCLUSION

This Article demonstrates that *Bostock* requires employer-provided health insurance to ensure sex-based protections. These protections encompass both sexual orientation and gender identity due to *Bostock*’s interpretation of “sex.” Employers are advised to review and revise their health benefits plans to align with *Bostock*. This Article also advocates that although *Bostock* does not interpret Section 1557, its approach to interpreting Title VII should be applied to Section 1557—“sex” includes sexual orientation and gender identity—because the language in Section 1557 (Title IX) is *identical* to the language discussed in *Bostock* (Title VII). President Biden affirmed this analysis by signing EO 13,988, which predominately relies on *Bostock*. This interpretation will likely be cemented by legal challenges when the Biden administration promulgates its own final rule to Section 1557.

There are still unresolved issues and barriers to access to health care for LGBTQ persons. One barrier, for example, is religious objections under both Title VII and the ACA.¹⁴⁰ Second, whether a particular decision involving

136. *Id.* at 2–3; Bass, *supra* note 134.

137. PA. HUM. RELS. COMM’N, *supra* note 135, at 2.

138. PHILA., PA., CODE § 9–1105 (2013).

139. *Public Accommodations*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/public-accommodations> (last visited Jan. 23, 2022).

140. *See, e.g.*, *Fulton v. City of Phila.*, 320 F. Supp. 3d 661 (E.D. Pa. 2018), *rev’d*, 141 S. Ct. 1868 (2021) (remanded for further proceedings consistent with the Supreme Court opinion); *Our Lady of Guadalupe Sch. v. Agnes Morrissey-Berru*, 140 S. Ct. 2049 (2020), *as amended* (Aug. 16, 2021); *Franciscan All., Inc. v. Becerra*, No. 7:16-CV-00108-O, 2021 WL 3492338 (N.D. Tex. Aug.

coverage of specific services discriminates against LGBTQ employees as compared to other non-LGBTQ employees was left unanswered by *Bostock*. Therefore, what constitutes a discriminatory coverage decision within an individual's health benefits plan will likely be addressed by the courts in the near future.

Health care entities who, in reliance on *Bostock*, implement anti-discriminatory practices for LGBTQ persons may promote themselves as an ally and a LGBTQ friendly space, which helps foster a positive relationship and experience between the patient and provider.¹⁴¹ Because of *Bostock*, future presidential administrations will not be able to exclude LGBTQ status through regulation or guidance, as the Trump administration did.¹⁴² Regardless of the current legal challenges, states are not barred from banning discrimination in health care on the basis of gender identity, sexual orientation, or other grounds beyond federal law. This is evident in current state public accommodations laws that prohibit discrimination on the basis of sex, where sexual orientation and gender identity are included under the definition of sex. Hence, state action may be the solution until federal law provides a *clear* answer on how to protect *all* LGBTQ persons within health care.

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9, 2021). For a discussion on how religious health care organizations and providers are denying care to transgender patients, see Esther Ju, *Unclear Conscience: How Catholic Hospitals and Doctors Are Claiming Conscientious Objections to Deny Healthcare to Transgender Patients*, 2020 U. ILL. L. REV. 1289, 1289–326 (2020).

141. See ASS'N AM. MED. COLLS., IMPLEMENTING CURRICULAR AND INSTITUTIONAL CLIMATE CHANGES TO IMPROVE HEALTH CARE FOR INDIVIDUALS WHO ARE LGBT, GENDER NONCONFORMING, OR BORN WITH DSD 2 (2014), https://store.aamc.org/downloadable/download/sample/sample_id/129/.

142. Congress, however, could always amend Title VII and the other nondiscrimination statutes to exclude LGBTQ status from the definition of sex. This is beyond the scope of this Article.

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