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## Transgender Rural Communities and Legal Rights to Gender-Affirming Health Care

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# TRANSGENDER RURAL COMMUNITIES AND LEGAL RIGHTS TO GENDER-AFFIRMING HEALTH CARE

*Nathan R. Hamons & Valarie K. Blake\**

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## I. INTRODUCTION

Transgender people face challenges in accessing health care and partly as a result suffer serious health disparities including greater rates of addiction, suicidality, and death.<sup>1</sup> Particularly, transgender individuals often lack gender-affirming care, or “health care that holistically attends to transgender people’s physical, mental, and social health needs and well-being while respectfully affirming their gender identity.”<sup>2</sup> Even routine care like cancer screenings may be compromised when providers lack experience and training with transgender

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<sup>1</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Feb. 22, 2022) (describing historically common health disparities in the lesbian, gay, bisexual, and transgender (LGBT) community).

<sup>2</sup> Sari L. Reisner, Asa Radix & Madeline B. Deutsch, *Integrated and Gender-Affirming Transgender Clinical Care and Research*, 72 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME S235, S238 (2016).

needs.<sup>3</sup> Transgender individuals may experience bias and hostility in general health care settings that discourages them from seeking care later.<sup>4</sup> Specialty services can be hard to come by due to a dearth of providers and substantial costs, ranging from hundreds of dollars monthly for things like hair removal, binders, and hormonal therapies, to tens-of-thousands of dollars for facial feminizing procedures and gender-affirming surgeries.<sup>5</sup> Health insurers have historically denied payment for many, or all, of these treatments based on outdated rationales that gender-affirming care is unproven, unnecessary, and purely cosmetic.<sup>6</sup>

Rural transgender communities face the same cost and access challenges but to a larger degree.<sup>7</sup> Cost challenges are amplified in rural states, where government officials and lawmakers often use their powers to ban insurance coverage for transgender care or make it difficult to obtain.<sup>8</sup>

Several federal and state legal challenges have recently succeeded in undoing transgender coverage bans throughout the nation. This article explores one legal challenge to a transgender benefits ban playing out currently in West Virginia, *Fain v. Crouch*,<sup>9</sup> and what is at stake for the transgender community living in Appalachia and other similar rural communities.

Part II describes barriers transgender individuals face generally in accessing high-quality, culturally sensitive, and cost-effective health care. Unique barriers to health care for transgender rural communities are considered in Part III. Part IV describes *Fain v. Crouch* and why the time is ripe to finally challenge discriminatory transgender benefit bans, given there is a clear ban on sex discrimination in health care after passage of Section 1557 of the Affordable Care Act (ACA) and clear expression by the Supreme Court in *Bostock v.*

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<sup>3</sup> See generally Ariella R. Tabaac, Megan E. Sutter, Catherine S. J. Wall & Kellan E. Baker, *Gender Identity Disparities in Cancer Screening Behaviors*, 54 AM. J. PREVENTATIVE MED. 385 (2018).

<sup>4</sup> See S. E. JAMES, J. L. HERMAN, S. RANKIN, M. KEISLING ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURV. 98 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>5</sup> *Preparing for Your Hormone Therapy Visit*, PLANNED PARENTHOOD W. PA., <https://www.plannedparenthood.org/planned-parenthood-western-pennsylvania/patients/introducing-hormone-therapy/preparing-your-hormone-therapy-visit> (last visited Feb. 22, 2022) (Planned Parenthood of Western Pennsylvania quotes a price tag of \$150–\$200 monthly for hormonal therapies for uninsured who do not qualify for low-income assistance from their program); Exa Zim & Benji Jones, *Medical Treatments for Transgender People in the US Can Cost Over \$100K, Even with Insurance. Here's Why They're So Expensive.*, INSIDER (Mar. 31, 2021, 4:18 PM), <https://www.insider.com/medical-treatments-transgender-people-america-expensive-2019-7> (other estimates for a variety of treatments).

<sup>6</sup> Liza Khan, Note, *Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform*, 11 YALE J. HEALTH POL'Y, L. & ETHICS 375, 393 (2011).

<sup>7</sup> See *infra* notes 34–54.

<sup>8</sup> See *infra* notes 55–63.

<sup>9</sup> *Fain v. Crouch*, 540 F. Supp. 3d 575 (S.D. W. Va. 2021).

*Clayton County*<sup>10</sup> that sex discrimination encompasses gender identity, among other arguments. Lastly, Part V considers what the successful undoing of transgender coverage bans means for both payment and delivery challenges faced by rural communities.

## II. BARRIERS TO ACCESS TO GENDER-AFFIRMING CARE

Lesbian, gay, bisexual, or transgender (LGBT) individuals suffer serious health disparities associated largely with the broader stigma and discrimination they encounter in everyday life.<sup>11</sup> Transgender individuals suffer higher rates of HIV and sexually transmitted infections, mental health challenges, substance abuse, victimization, and suicidality than the general population.<sup>12</sup>

Not all providers are trained to handle even the most routine health care needs of LGBT individuals and, especially, transgender communities.<sup>13</sup> For this reason and others, LGBT communities, transgender people included, are less likely to obtain regular health care or to have a regular source of health care when compared to non-LGBT individuals.<sup>14</sup> Added to this, transgender people report experiencing discrimination and hostility in health care settings,<sup>15</sup> which can deter individuals from seeking medically necessary care when they need it in the future.<sup>16</sup>

Cost is a significant barrier to care, alongside these other concerns. One-third of transgender people report not seeking medically necessary care because

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<sup>10</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

<sup>11</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, *supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> Daphna Stroumsa, Deirdre A. Shires, Caroline R. Richardson, Kim D. Jaffee et al., *Transphobia Rather Than Education Predicts Provider Knowledge of Trans Health Care*, 53 *MED. EDUC.* 398 (2019) (describing how transphobia and lack of training and education are both barriers to prior knowledge about transgender health needs).

<sup>14</sup> ARIELLE BOSWORTH, GINA TURRINA, SARADA PYDA, KIEAUNA STRICKLAND ET AL., *HEALTH INSURANCE COVERAGE AND ACCESS TO CARE FOR LGBTQ+ INDIVIDUALS: CURRENT TRENDS AND KEY CHALLENGES* 8–9 (2021), <https://aspe.hhs.gov/sites/default/files/2021-07/lgbt-health-ib.pdf>.

<sup>15</sup> In a 2015 survey of transgender people conducted by the National Center for Transgender Equality (NCTE), one-third of transgender people who had seen a health care provider in the prior year reported experiencing a negative event, for example, being harassed or being denied treatment because of their gender identity. JAMES ET AL., *supra* note 4, at 5. The survey is due to be performed again in 2022. See *Pledge to Take the 2022 U.S. Trans Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://www.ustranssurvey.org/> (last visited Feb. 22, 2022). In a different 2018 study, 16% of LGBT people reported that they had experienced discrimination in a healthcare setting because of their sexual orientation or gender identity. BOSWORTH ET AL., *supra* note 14.

<sup>16</sup> In the 2015 National Center for Transgender Equality survey, 23% of transgender people reported skipping medical care out of fear of experiencing discrimination in a health care setting. JAMES ET AL., *supra* note 4.

they cannot afford it<sup>17</sup> and this is a consequence of both uninsurance in this community as well as inadequate insurance benefits to meet particular transgender needs.

The transgender community experiences higher rates of uninsurance compared to the cisgender community.<sup>18</sup> Transgender individuals also disproportionately rely on Medicaid benefits compared to other forms of insurance.<sup>19</sup> Transgender people are more likely to be people of color, to be low-income, to report fewer years of education, and to be younger, all factors associated with both higher rates of uninsurance and Medicaid coverage.<sup>20</sup>

Even those with insurance find that it is poorly designed to meet their unique needs as transgender individuals, exposing many to unsustainable out of pocket costs.<sup>21</sup> As many as one quarter of transgender individuals report a problem with their health benefits covering medically necessary, even routine, care.<sup>22</sup> For those seeking specialty care, insurers deny coverage to LGBT individuals seeking hormonal treatments in 25% of cases, and gender-affirming surgery in 55% of cases.<sup>23</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> Wyatt Koma, Matthew Rae, Amrutha Ramaswamy, Tricia Neuman et al., *Demographics, Insurance Coverage, and Access to Care Among Transgender Adults*, KAISER FAM. FOUND. (Oct. 21, 2021), <https://www.kff.org/health-reform/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults/> (reporting uninsurance rates of 19% for the transgender community vs. 12% of cisgender people).

<sup>19</sup> CHRISTY MALLORY & WILLIAM TENTINDO, *MEDICAID COVERAGE FOR GENDER-AFFIRMING CARE*, WILLIAMS INST. 9–10 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Gender-Care-Oct-2019.pdf> (Disproportionate reliance on Medicaid benefits is true of the LGBT community generally. In 2019, 17.2% of LGBT individuals were insured under Medicaid whereas 10.3% of non-LGBT individuals were insured through Medicaid.).

<sup>20</sup> Koma et al., *supra* note 18.

<sup>21</sup> *See* MOVEMENT ADVANCEMENT PROJECT, *WHERE WE CALL HOME: LGBT PEOPLE IN RURAL AMERICA* 39–40 (2019), <https://www.lgbtmap.org/file/lgbt-rural-report.pdf>; *see also* Samuel Rosh, *Beyond Categorical Exclusion: Access to Transgender Healthcare in State Medicaid Programs*, 51 COLUM. J. L. & SOC. PROBS. 1, 10–11 (2017); Keren Landman, *Fresh Challenges to State Exclusion on Transgender Health Coverage*, NPR (Mar. 12, 2019), <https://www.npr.org/sections/health-shots/2019/03/12/701510605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage>; Cassandra Stephenson, *Nashville Employee Benefits Board Denies Transgender Affirming-Health Coverage*, HEALTH INS. NEWSL. (Dec. 9, 2021), <https://insurancenewsnet.com/oarticle/nashville-employee-benefits-board-denies-transgender-affirming-health-coverage>.

<sup>22</sup> JAMES ET AL., *supra* note 4, at 10.

<sup>23</sup> *Id.*

Gender dysphoria is recognized as a medical condition in the Diagnostic and Statistical Manual of Mental Disorders.<sup>24</sup> Hormonal therapies, surgeries, and behavioral health services are all widely regarded as medically indicated treatments for gender dysphoria.<sup>25</sup> Yet, not all insurance providers cover healthcare services designed to treat gender dysphoria and some expressly ban coverage for care related to gender dysphoria entirely or ban specific treatments.<sup>26</sup> Sometimes, state laws support these coverage exclusions, either by permitting such bans or even occasionally requiring them.<sup>27</sup>

Coverage bans are often defended on grounds that gender confirmation therapies are experimental and not proven to be medically beneficial.<sup>28</sup> But there is robust agreement in the medical community to the contrary.<sup>29</sup> Additionally, untreated gender dysphoria can be harmful to patients' physical, mental, and emotional health.<sup>30</sup> Perhaps of even greater importance to lawmakers and public officials, coverage for many therapies is not likely to raise costs of insurance greatly when one considers the financial offsets from decreasing the incidence of suicide, depression, drug abuse, and HIV caused by untreated gender dysphoria.<sup>31</sup> One study estimated that covering hormonal therapies and surgeries for those who want them would only raise premiums for insureds by less than two cents each.<sup>32</sup>

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<sup>24</sup> *Gender Dysphoria: Symptoms & Causes*, MAYO CLINIC (Dec. 6, 2019), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255>.

<sup>25</sup> *Gender Dysphoria: Diagnosis & Treatment*, MAYO CLINIC (Dec. 6, 2019), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/diagnosis-treatment/drc-20475262>.

<sup>26</sup> *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies](https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies) (last visited Feb. 22, 2022).

<sup>27</sup> See *infra* notes 54–57, 88–94.

<sup>28</sup> See generally Khan, *supra* note 6.

<sup>29</sup> *AMA to States: Stop Interfering in Health Care of Transgender Children*, AM. MED. ASS'N (Apr. 26, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children> (stating “[f]or gender diverse individuals, standards of care and accepted medically necessary services that affirm gender or treat gender dysphoria may include mental health counseling, non-medical social transition, gender-affirming hormone therapy, and/or gender-affirming surgeries.”).

<sup>30</sup> See *Chapter One Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2167–68 (2021) (discussing impacts on youth who are unable to obtain treatment for gender dysphoria).

<sup>31</sup> William V. Padula, Shiona Heru & Jonathan D. Campbell, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. GEN. INTERNAL MED. 394, 398 (2016).

<sup>32</sup> *Id.*

### III. BARRIERS TO CARE UNIQUE TO RURAL COMMUNITIES AND APPALACHIA

Residents of rural communities experience poorer health than their urban and suburban dwelling counterparts.<sup>33</sup> Even privileged people may encounter challenges accessing health care, especially specialized care, in a place like West Virginia, with its mountainous terrain, population distribution, historic locations of hospitals, limited internet access, provider shortages, poverty, and transportation issues.<sup>34</sup>

Rural transgender populations are understudied—transgender individuals living in Appalachia, even more so.<sup>35</sup> But since rurality and sexual minority status are each independently associated with poor health outcomes, there is good reason to think the intersection only compounds disadvantage.<sup>36</sup>

What little we do know suggests that LGBT individuals living in rural communities experience even more significant disparities compared to both non-LGBT people in those communities and LGBT people living in urban or suburban settings.<sup>37</sup> Rural-living transgender people in particular report serious mental health and substance abuse challenges, and health issues stemming from unsafe sex practices.<sup>38</sup> Rural locale appears to be a direct driver of mental health challenges for at least some of these individuals.<sup>39</sup>

Rural transgender health care disparities are driven in part by a combination of both payment and delivery challenges. Rural communities of

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<sup>33</sup> See generally Kacey M. Lefevers, *Healthcare Access and Poverty Among Central Appalachian Residents*, 3 KY. J. UNDERGRADUATE SCHOLARSHIP 89 (2019).

<sup>34</sup> NANCY M. LANE, THOMAS R. KONRAD, TOMAS C. RICKETTS, III, RANDY RANDOLPH ET AL., *HEALTH CARE COSTS AND ACCESS DISPARITIES IN APPALACHIA* 63 (2012), <https://www.arc.gov/wp-content/uploads/2020/06/HealthCareCostsandAccessDisparitiesinAppalachia.pdf>.

<sup>35</sup> Megan E. Gandy, Kacie M. Kidd, James Weiss, Judith Litch et al., *Trans\*Forming Access and Care in Rural Areas: A Community-Engaged Approach*, 18 INT'L J. ENV'T RSCH. PUB. HEALTH 1, 2 (2021).

<sup>36</sup> See generally Stacy A. Grundy, Roselind C. Brown & Wiley D. Jenkins, *Health and Health Care of Sexual Minority Individuals in the Rural United States: A Systematic Review*, 32 J. HEALTH CARE POOR & UNDERSERVED 1639 (2021).

<sup>37</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 21, at 38, 40.

<sup>38</sup> Gandy et al., *supra* note 35.

<sup>39</sup> See Morgan T. Sinnard, Christopher R. Raines & Stephanie L. Budge, *The Association Between Geographic Location and Anxiety and Depression in Transgender Individuals: An Exploratory Study of an Online Sample*, 1 TRANSGENDER HEALTH 181 (2016). See generally Christopher M. Fisher, Jay A. Irwin & Jason D. Coleman, *LGBT Health in the Midlands: A Rural/Urban Comparison of Basic Health Indicators*, 61 J. HOMOSEXUALITY 1062 (2014) (noting that regions may affect health outcomes to the same degree or more than urban/rural divides).

LGBT individuals are less likely to have access to LGBT specialty healthcare providers,<sup>40</sup> except for those living near major universities.<sup>41</sup>

Commuting for care, either out of state or to urban hubs, is a given for these populations, especially for transgender individuals who require more specialized care.<sup>42</sup> A 2020 study reported that only 20 states had a provider who performed gender-affirming surgeries.<sup>43</sup> There is an alarming lack of access to providers, particularly in the Appalachian region.<sup>44</sup> Of providers, about one-third do not accept Medicaid,<sup>45</sup> the common insurance for many transgender individuals, especially those living in rural settings.<sup>46</sup> Privately insured individuals may fare better both because specialty care providers are more likely to accept private benefits and some plans may allow individuals to seek care for partial or full coverage outside a given state.<sup>47</sup>

Rural LGBT residents report a lifetime living amidst stigma and discrimination, especially older communities of LGBT people.<sup>48</sup> The health care setting is no exception, and many experience bias and lack of cultural competence.<sup>49</sup> Some transgender individuals report that while they prefer to be treated in gender-affirming ways, often the best they can hope for in rural health care settings is simply not to be treated more poorly than others.<sup>50</sup> Many also

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<sup>40</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 21, at 41.

<sup>41</sup> Katy A. Ross, *The (S)lack of Queer Healthcare in Appalachia*, in COMMUNICATING INTIMATE HEALTH 73, 78–79 (Angela Cooke-Jackson & Valerie Rubinsky eds., 2021).

<sup>42</sup> *Id.*

<sup>43</sup> See Alexandra Terris-Feldman, Alessandra Chen, Grace Poudrier & Maurice Garcia, *How Accessible Is Genital Gender-Affirming Surgery for Transgender Patients with Commercial and Public Health Insurance in the United States? Results of a Patient-Modeled Search for Services and a Survey of Providers*, 8 SEXUAL MED. 664, 664 (2020).

<sup>44</sup> *Id.* at 666–67.

<sup>45</sup> *Id.* at 669.

<sup>46</sup> *Id.* at 665.

<sup>47</sup> See *id.* The same study reported that 100% of academic centers and 64% of private practices supplying gender-affirming surgery accepted commercial insurance. *Id.* at 666.

<sup>48</sup> See Kelly A. Williams, Emily K. Dakin & Audrey Lipschutz, *LGBT+ Older Adults in Rural South Central Appalachia: Perceptions of Current and Future Formal Service Needs*, 65 J. GERONTOLOGICAL SOC. WORK 217, 217 (2021).

<sup>49</sup> *Id.*; MOVEMENT ADVANCEMENT PROJECT, *supra* note 21, at 38, 40–41; see also J. Whitehead, John Shaver & Rob Stephenson, *Outness, Stigma, and Primary Health Care Utilization Among Rural LGBT Populations*, 11 PLOS ONE 1 (2016) (suggesting reluctance of LGBT individuals to disclose LGBT status to providers and unwillingness of LGBT patients to seek care when stigma is experienced).

<sup>50</sup> For specific examples of cultural insensitivities experienced by transgender rural communities in health care settings, see Gandy et al., *supra* note 35, at 8. For example, “[p]articipants shared many stories of providers using deadnames and/or wrong pronouns despite the chart instructing them otherwise.” *Id.*



report intersectional identities, such as being both transgender and a racial minority, which can lead to even greater bias.<sup>51</sup>

Rural transgender populations also report problems with health benefits. Discriminatory insurance practices may be amplified in a rural setting for a few reasons. The social stigma and lack of knowledge regarding the particularized medical needs of LGBT individuals, which is more common in rural regions like Appalachia, likely contribute to discriminatory insurance practices. In fact, some rural transgender people report a reluctance to notify insurers of their gender identity for fear that insurers will not authorize routine medical care.<sup>52</sup> Their concerns are well-founded, as insurers have in the past denied benefits like routine PAP smears or breast screens to transgender men.<sup>53</sup>

Many transgender people seeking gender-confirming care report loopholes and onerous hurdles to access and this is no different in rural communities.<sup>54</sup>

Most concerning, rural communities also play an outsized role in banning, or at minimum not requiring, their insurers to cover many transgender health care services.

Arkansas, in 2021, passed a law that would have prohibited the use of state funds or private insurance coverage in the state for any gender-affirming care occurring below the age of 18.<sup>55</sup> The state law would have also expressly permitted private insurers in the state to deny gender-affirming care to transgender people of all ages.<sup>56</sup> A court has issued a temporary injunction against enforcement of the law while a suit is pending.<sup>57</sup>

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<sup>51</sup> See *id.* at 9.

<sup>52</sup> *Id.* at 10.

<sup>53</sup> Tara Murtha, *The Problem with Obamacare for Some Transgender Policyholders*, REWIRE NEWS GRP. (Mar. 12, 2014, 2:57 PM), <https://rewirenewsgroup.com/article/2014/03/12/problem-obamacare-transgender-policyholders/> (noting that “a transgender man whose social security card and health insurance policy reflects that he is a man may be denied coverage of routine health care like a Pap test. Worse, he could be denied treatment of a sex-specific disease such as cervical cancer. (Doctors say mammograms are less of a problem, since men already get screened for breast cancer.)”).

<sup>54</sup> Gandy et al., *supra* note 35, at 9. Said one transgender resident of West Virginia, about their health insurance, “I need a more flexible or less gatekeeper kind of health insurance policy.” Said another, “considering I have been in transition for close to 20 years, that just seems absolutely ridiculous to me to spend a year doing [therapy] just to fulfill this insurance requirement to get something I need now.” *Id.* (alteration in original).

<sup>55</sup> H.R. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

<sup>56</sup> *Id.*

<sup>57</sup> *Brandt v. Rutledge*, No. 4:21-CV-00450, 2021 WL 3292057, at \*7 (E.D. Ark. Aug. 2, 2021); Order denying Defendants’ Motion to Dismiss and granting Plaintiffs’ Motion for Preliminary Injunction at ¶ 59, *Brandt v. Rutledge*, No. 4:21-CV-00450 (E. D. Ark. 2021).

Although 24 states have laws on the book expressly prohibiting private insurers from discriminating based on gender identity, most rural states sprawling the Midwest, South, and Appalachia lack these safeguards.<sup>58</sup>

State employer plans can be important safety nets in rural states, where other large employers and insurers generally may be in short supply. But 12 states' employee health benefit plans explicitly exclude healthcare-related to the treatment of gender dysphoria, including gender-affirming surgeries, and these states are predominantly rural and mainly located in Appalachia or the Midwest.<sup>59</sup> North Carolina, Ohio, Tennessee, and West Virginia all expressly exclude transition-related health care from state employee benefit plans.<sup>60</sup>

While federal law requires states to cover certain health benefits in the Medicaid Act, transgender benefits are not among them, and states are left to decide whether to offer them optionally.<sup>61</sup> One-third of all states do not include hormone therapy as a covered benefit, while about half of states fail to cover gender-affirming surgeries.<sup>62</sup> The problem is worse in Appalachia. All but New York and Pennsylvania fail to cover gender-affirming surgery through Medicaid, while a few more Appalachian states opt to cover hormonal therapies through Medicaid.<sup>63</sup> Accordingly, transgender individuals living in Appalachia face increased barriers in accessing healthcare-related to transition and gender dysphoria.

#### IV. LEGAL BATTLES FOR THE RIGHT TO TRANSGENDER HEALTH BENEFITS

Rural states have at minimum been slow to adopt favorable policies for transgender individuals and in some cases have deliberately put hurdles in place to bar access to medically indicated gender-affirming care. Legal challenges are increasingly successful at striking down transgender benefit bans, suggesting that public and private insurers fail to cover these benefits at their own peril. This Part considers *Fain v. Crouch* as a model for the common types of legal

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<sup>58</sup> *Healthcare Laws and Policies*, *supra* note 26.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> MALLORY & TENTINDO, *supra* note 19, at 2. ("Federal law does not expressly direct states to either include or exclude coverage for gender-affirming care under their state Medicaid programs.").

<sup>62</sup> Michael Zaliznyak, Eric E. Jung, Catherine Bresee & Maurice M. Garcia, *Which U.S. States' Medicaid Programs Provide Coverage for Gender-Affirming Hormone Therapy and Gender-Affirming Genital Surgery for Transgender Patients? A State-By-State Review, and a Study Detailing the Patient Experience to Confirm Coverage of Services*, 18 J. SEXUAL MED. 410 (2021).

<sup>63</sup> *Id.* Note, however, that some states that indicate they cover hormone treatments are being sued for denying coverage to individuals. For example, see the practice of denial of coverage alleged in *Fain v. Crouch*. See generally Class Action Complaint, *Fain v. Crouch*, 540 F. Supp. 3d 575 (S.D. W. Va. 2021) (No. 3:20-CV-00740) [hereinafter *Fain* Complaint].

challenges lodged against transgender benefit bans. The article particularly focuses on the merits of one claim, Section 1557 of the ACA, which bans sex discrimination by entities receiving federal funds.<sup>64</sup> While the authors believe all four claims lodged by the Crouch plaintiffs have merit, Section 1557 has great promise because it is the broadest claim and can reach discriminatory conduct in both private and public insurance plans.

#### A. Fain v. Crouch

Two of the plaintiffs are transgender residents of the state of West Virginia.<sup>65</sup> They have both been denied coverage for gender dysphoria; one through Medicaid, the other through the WV state employer health plan.<sup>66</sup> They, along with one of the individual's cisgender spouse, who is the covered state employee, allege the denial of coverage for gender-affirming care by two key insurers in the state of West Virginia: the state employee health plan and the state's Medicaid program (and a managed care company administering managed care plans for both).<sup>67</sup>

The plaintiffs, in their complaint, explain how the insurance denials harm their overall health and well-being. One of the individuals has identified as a male since age six but did not make known his male identity to peers, family, and others until much later in life for fear of discrimination.<sup>68</sup> Medicaid has denied coverage for the monthly testosterone therapies his health care provider has prescribed him and so he must pay for them out of pocket.<sup>69</sup> Medicaid has also denied him coverage for a bilateral mastectomy, a procedure that is medically indicated because having female-appearing breasts exacerbates his gender dysphoria.<sup>70</sup> Without the procedure, the plaintiff depends on wearing a binder daily, sometimes for 16 hours, and this causes him frequent sores and difficulty breathing.<sup>71</sup>

The second plaintiff depends on the state employer plan for health benefits and has also been denied coverage for a bilateral mastectomy.<sup>72</sup> Wearing a binder compromises this individual's comfort and ability to breathe so much that, at times, he has no choice but to appear in public without one and this creates

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<sup>64</sup> 42 U.S.C.A. § 18116(a) (West 2022).

<sup>65</sup> Fain Complaint, *supra* note 63, ¶¶ 68–105.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* As a spouse and dependent, one of the individuals participates in the State Health Plan through a family plan. *Id.* ¶¶ 88–105.

<sup>68</sup> *Id.* ¶¶ 68–87.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ¶¶ 88–105.

significant stress that people might mistakenly identify him as female.<sup>73</sup> He has also been denied coverage for testosterone injections.<sup>74</sup> He paid out of pocket for a period but has since been unable to afford them, so physical changes associated with his transition have been suspended.<sup>75</sup>

Both the state employee plan and Medicaid are important for the state, as a large portion of West Virginians depend on one of these two plans for their health benefits.<sup>76</sup> The blanket ban on coverage potentially affects a broad swath of the 6,100 transgender adults living in the state.<sup>77</sup>

According to their complaint, the state Medicaid plan expressly does not cover “[t]ranssexual surgery.”<sup>78</sup> Additionally, each Medicaid managed care plan available in the state also denies coverage for surgery and some deny coverage for hormonal treatments too.<sup>79</sup> The state employer plan’s four preferred provider options all have similar language in their 2020 and 2021 handbooks with exclusions for “[s]urgical or pharmaceutical treatments associated with gender dysphoria or any physical, psychiatric, or psychological examinations, testing, treatments or services provided or performed in preparation for, or as a result of, sex transformation surgery.”<sup>80</sup> There are several managed care options available

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> One estimate is that one-third of all West Virginians use Medicaid for health benefits. June Leffler, *Report: A Third of West Virginians Use Medicaid*, W. VA. PUB. BROAD. (July 26, 2021, 12:05 PM), <https://www.wvpublic.org/health-science/2021-07-26/report-a-third-of-west-virginians-use-medicaid>. Additionally, 21% (nearly a quarter) of all West Virginia residents work for the state, and it ranks fourth in the country for the proportion of residents employed by the state government. *West Virginia Ranks 4th in Largest Percentage of Government Employees*, 12 WBOY (May 15, 2019, 4:03 PM), <https://www.wboy.com/news/west-virginia/west-virginia-ranks-4th-in-largest-percentage-of-government-employees/>. This highlights how critical the state employee plan is for so many West Virginia residents and their families.

<sup>77</sup> See CHRISTY MALLORY, LUIS VASQUEZ, TAYLOR N. T. BROWN, RAYNA E. MOMEN ET AL., *THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN WEST VIRGINIA* 7 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-WV-Feb-2021.pdf>.

<sup>78</sup> Fain Complaint, *supra* note 63, ¶ 61 (alteration in original).

<sup>79</sup> *Id.* Notably,

(1) UniCare excludes coverage for “[s]ex transformation procedures and hormone therapy for sex transformation procedures;” (2) The Health Plan provides that “[s]ex change, hormone therapy for sex transformation, and gender transition procedures/expenses will not be paid for by The Health Plan;” and (3) Aetna Better Health excludes coverage for “[s]ex transformation procedures and hormone therapy for sex transformation procedures.”

*Id.*

<sup>80</sup> *Id.* ¶ 64 (alteration in original).

under the state benefits that also contain a “blanket exclusion of coverage for gender-confirming care.”<sup>81</sup>

The suit alleges the express exclusions of transition-related health care for transgender individuals violate federal law. Plaintiffs bring four federal claims: violation of the Equal Protection Clause, violation of Section 1557 of the ACA, and two violations of the federal Medicaid Act’s Availability and Comparability Requirements.<sup>82</sup> Plaintiffs seek certification of classes for those who are similarly situated and seek declaratory and injunctive relief that the exclusions of transition-related health care and health care for the treatment of gender dysphoria violate federal law.<sup>83</sup> Since bringing the case, the court has granted a motion to include two other plaintiffs in the class, one a Medicaid recipient and one a state employee.<sup>84</sup>

The district court held on May 19, 2021, that the parties have standing to sue.<sup>85</sup> In the case of Medicaid participants, the court held that “[WV’s Medicaid agency] enacted a clear policy that excludes gender-confirming surgical care with no exceptions. In doing so, the [West Virginia Department of Health and Human Resources] caused a concrete injury to Plaintiff Fain by constructing an allegedly discriminatory barrier between him and health insurance coverage.”<sup>86</sup> Regarding the state employee, the court held that the plaintiff had alleged a plausible injury that could be redressed by the state health plan’s administrator in the future by preventing “contracting for private plans with a discriminatory policy, prohibit[ing] enforcement of discriminatory policies in those plans, or affirmatively requir[ing] him to provide access to gender-confirming care.”<sup>87</sup>

This Article focuses on the promises of the Section 1557 claims because of its potential to redress discrimination in state employer plans, Medicaid, and other private insurance. It’s worth briefly examining the merits of the other claims, however, as they may prove to be useful remedies in certain contexts.

### *B. Equal Protection*

Plaintiffs claim the Medicaid and state employer health plan exclusions violate the Equal Protections clause because “participants who require gender-confirming care are denied coverage for that medically necessary care, while

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ¶¶ 118–56.

<sup>83</sup> *Id.* ¶¶ A–H.

<sup>84</sup> *See generally* Fain v. Crouch, No. 3:20-CV-0740, 2021 WL 5024357 (S.D. W. Va. Oct. 28, 2021).

<sup>85</sup> Fain v. Crouch, 540 F. Supp. 3d 575, 583 (S.D. W. Va. 2021).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 587.

cisgender Medicaid and state health plan participants can access the same kinds of treatments, including when related to their sex.”<sup>88</sup>

An Iowa state court recently struck down as unconstitutional and in violation of equal protection a state law prohibiting public insurers (including Medicaid) from paying for gender-affirming care.<sup>89</sup> Plaintiffs, Iowa Medicaid recipients, sued and successfully won on the grounds that the state statute violates the equal protections of Iowans.<sup>90</sup>

The court also held the Medicaid agency’s practice of denying transgender benefits violated the state’s civil rights act, which expressly prohibited discrimination by public accommodations based on gender identity, among other protected classes.<sup>91</sup>

This legal challenge took place in state court, where litigants had good reason to think there would be a successful outcome. An earlier decision in the Iowa Supreme Court had struck down the state’s Medicaid provision that classified transition surgeries as “cosmetic, reconstructive or plastic surgery” and banned all coverage for “surgeries for the purpose of sex reassignment” as violating the state’s civil rights act but had not reached the merits of an equal protection claim.<sup>92</sup> The more recent case was prompted after the legislature amended that state civil rights law to try to exempt insurers and transgender benefits bans in response to that state supreme court opinion.<sup>93</sup>

Equal protection challenges appear to show real promise here, especially as the Iowa judge held that the transgender ban was unconstitutional under either intermediate scrutiny or rational basis.<sup>94</sup> His reasoning was that the state could not win its argument because the Medicaid recipients “supply ample and un rebutted evidence that there are greater medical costs associated with denying transgender individuals access to transition-related care and necessary surgical

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<sup>88</sup> Fain Complaint, *supra* note 63, ¶ 125.

<sup>89</sup> *Vasquez v. Iowa Dep’t. of Hum. Servs.*, No. CVCV061729, slip op. at 59 (Iowa Dist. Ct. Polk Cnty. Nov. 19, 2021).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Good v. Iowa Dep’t. Hum. Servs.*, 924 N.W.2d 853, 858 (Iowa 2019) (“On our review, we affirm the judgment of the district court because the rule violates the [Iowa Civil Rights Act’s] prohibition against gender-identity discrimination. Because of this, we adhere to the doctrine of constitutional avoidance and do not address the constitutional claim.”) *Id.* at 856.

<sup>93</sup> Courtney Crowder & Tony Leys, “Kicked in the Face”: *Transgender Iowans in Pain After Amendment Bans Public Funds for Transition Care*, DES MOINES REG. (Apr. 30, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/04/30/transgender-health-care-iowa-supreme-court-medicaid-lgbtq-public-funds-transition-surgery-cost/3616900002/>.

<sup>94</sup> *Vasquez*, slip op. at 33.

procedures,”<sup>95</sup> a logic and reasoning that is arguably true beyond the borders of Iowa.<sup>96</sup>

Although the judge’s opinion is well-reasoned and worth highlighting, constitutional claims are limited to state action. They may do a great service in *Fain*, however, given that the plaintiffs allege discriminatory conduct by state actors in state employee plans and Medicaid plans.

### C. Medicaid Act Violations

The plaintiffs in *Fain* allege the Medicaid plan’s exclusions for transgender care violate the Medicaid Comparability Act because the ban “deni[es] . . . medically necessary services and treatments to Plaintiff . . . and members of the proposed Medicaid Class, while the same or similar services and treatments are covered for cisgender Medicaid beneficiaries.”<sup>97</sup>

Other litigants have found some success in challenging Medicaid benefits restrictions for transgender care under the Medicaid Act’s Comparability provision. The comparability provision in the Medicaid Act requires that the benefits provided to categorically needy Medicaid recipients “shall not be less in amount, duration, or scope” than the benefits made available to any other categorically needy person.<sup>98</sup> The Medicaid Act permits “appropriate limits on a service based on criteria such as medical necessity or on utilization control procedures,” but does not permit Medicaid plans to “arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.”<sup>99</sup> This language has been interpreted to prohibit discrimination between individuals who have the same service needs but arising from different medical diagnoses.

In *Cruz v. Zucker*, New York State’s Medicaid regulations denied coverage for breast augmentation, facial feminizing surgery, tracheal shave, body sculpting procedures, and electrolysis for transgender individuals because the agency viewed the procedures as elective.<sup>100</sup> Yet, Medicaid covered these procedures for non-transgender people with certain medical conditions.<sup>101</sup> Likewise, the state banned coverage of some gender-affirming services for people below the age of 18, while allowing some services for transgender adults.<sup>102</sup> The court agreed that the denial of coverage for these services for

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<sup>95</sup> *Id.* at 41.

<sup>96</sup> *See* Padula et al., *supra* note 31.

<sup>97</sup> *Fain* Complaint, *supra* note 63, ¶ 156.

<sup>98</sup> 42 U.S.C.A. § 1396a(a)(10)(B) (West 2022).

<sup>99</sup> 42 C.F.R. § 440.230(c)–(d) (2022).

<sup>100</sup> *Cruz v. Zucker*, 116 F. Supp. 3d 334, 336, 338 (S.D.N.Y. 2015).

<sup>101</sup> *See id.* at 338.

<sup>102</sup> *See id.*

transgender people while granting coverage to others for the same services violated the Medicaid Comparability Act because there was an equal medical need for these services.<sup>103</sup> Such claims are typically brought using a Section 1983 of the Civil Rights Act of 1871 claim to allow individual litigants to force state actors to enforce federal laws.<sup>104</sup>

These may also be powerful claims but are of course limited to challenging Medicaid coverage bans only.

#### D. Section 1557 Claims

Plaintiffs in *Fain* argue the Medicaid and state employer plans violate Section 1557 of the ACA “by discriminating against Plaintiffs and all similarly situated individuals on the basis of sex (including transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition).”<sup>105</sup>

Section 1557 offers great promise as a tool to combat transgender benefit bans because it reaches both private and public insurance discrimination. The Supreme Court’s decision in *Bostock v. Clayton County*<sup>106</sup> made the likelihood of success on these merits even greater for plaintiffs.

Section 1557 of the ACA prohibits health programs receiving federal financial assistance from discriminating against individuals based on race, color, national origin, age, disability, or sex.<sup>107</sup> Section 1557 prohibits sex discrimination by extending Title IX’s ban on sex discrimination by educational institutions to health care settings. The statute expressly applies to “health program[s]” receiving federal financial assistance as well as any executive agencies.<sup>108</sup> There has been some debate over the scope, but the plainest reading

<sup>103</sup> *Cruz v. Zucker*, 195 F. Supp. 3d 554, 576–79 (S.D.N.Y. 2016), *op. altered upon reconsideration*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016).

<sup>104</sup> See generally WEN S. SHEN, CONG. RSCH. SERV., LSB10320, COURTS SPLIT ON WHETHER PRIVATE INDIVIDUALS CAN SUE TO CHALLENGE STATES’ MEDICAID DEFUNDING DECISIONS: CONSIDERATIONS FOR CONGRESS (PART I OF II) (2019), <https://fas.org/sgp/crs/misc/LSB10320.pdf> (detailing use of § 1983 in Medicaid challenges and the developing case law surrounding private rights of action in Medicaid generally).

<sup>105</sup> *Fain* Complaint, *supra* note 63, at ¶ D2.

<sup>106</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

<sup>107</sup> 42 U.S.C.A. § 18116 (West 2022).

<sup>108</sup> The statute states in pertinent part:

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance,



of the statute is that it applies to Medicaid as a government agency.<sup>109</sup> Additionally, many private insurers, state employer plans, and Medicaid state agencies accept federal dollars—meaning Section 1557 not only applies to the conduct of these insurance litigants in this case, but also to many insurers around the country.<sup>110</sup>

Whether Section 1557 covers gender identity discrimination has also been the subject of much debate. Obama-era regulators defined “sex” to include gender identity in their 2016 rule;<sup>111</sup> Trump-era regulators removed this language in their 2020 rule interpreting the statute.<sup>112</sup> As argued elsewhere, however, the recent Supreme Court decision in *Bostock* seems to put this controversy to bed and make plainly clear that “sex” must encompass gender identity for purposes of health care discrimination.<sup>113</sup>

The United States Supreme Court has expressly recognized that discrimination based on transgender status or sexual preference is patently discrimination based on sex.<sup>114</sup> The Court recognized that the language of Title VII, which expressly precludes discrimination based on sex, applies to individuals who identify as homosexual or transgender.<sup>115</sup>

The Fourth Circuit Court of Appeals followed the Supreme Court of the United States in interpreting Title IX.<sup>116</sup> In *Grimm v. Gloucester County School Board*, the Fourth Circuit Court of Appeals interpreted whether a policy that

including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

*Id.* § 18116(a).

<sup>109</sup> *Section 1557: Frequently Asked Questions*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html> (last visited Feb. 28, 2022) (“Covered entities may include hospitals, health clinics, health insurance issuers, state Medicaid agencies, community health centers, physician’s practices and home health care agencies.”)

<sup>110</sup> Roosa Tikkanen, Robin Osborn, Elias Mossialos, Ana Djordjevic et al., *International Health Care System Profiles: United States*, COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/united-states>.

<sup>111</sup> 45 C.F.R. § 92.4 (2016).

<sup>112</sup> Nondiscrimination in Health and Education Programs or Activities, 84 Fed. Reg. 27,846, 27,857 (June 14, 2019).

<sup>113</sup> See generally Amy Post, Ashley Stephens & Valarie Blake, *Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After Bostock*, 11 CALIF. L. REV. ONLINE 545 (2021).

<sup>114</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

<sup>115</sup> *Id.* at 1754 (“In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”)

<sup>116</sup> See generally *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

required students to use bathrooms based on their biological sex violated the Equal Protection Clause and Title IX.<sup>117</sup> The Fourth Circuit found that the policy, which required students to use designated bathrooms based on their biological sex, violated the Equal Protection Clause and constituted sex-based discrimination in violation of Title IX.<sup>118</sup> Although the decision in *Bostock* did not expressly apply to the issue in *Grimm*, the Fourth Circuit Court of Appeals held that the policy violated Title IX because the school board discriminated on the basis of gender identity and, as a result, treated transgender individuals worse than others who were similarly situated.<sup>119</sup> The Fourth Circuit Court of Appeals relied on the United States Supreme Court's decision in *Bostock* in finding that discrimination on the basis of gender identity constituted discrimination based on sex:

After the Supreme Court's recent decision in *Bostock v. Clayton County*, — U.S. —, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him “on the basis of sex.” Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination “on the basis of sex.” As the Supreme Court noted, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions.<sup>120</sup>

The Fourth Circuit Court of Appeals' recognition of discrimination based on gender identity and sexual orientation as sex-based discrimination under Title IX provides insight and guidance for courts interpreting Section 1557 of the ACA.<sup>121</sup>

After *Bostock*, rule makers under the Biden administration made plain that “[the Office of Civil Rights of the DHHS] will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1)

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<sup>117</sup> See *id.* at 603.

<sup>118</sup> See *id.* at 608. The Fourth Circuit found that the policy at issue constituted sex-based discrimination and that transgender individuals constitute a quasi-suspect class. *Id.* at 607–08. Accordingly, the Fourth Circuit Court of Appeals applied heightened scrutiny in analyzing whether the school board's policy violated the equal protection clause. *Id.* at 613.

<sup>119</sup> *Id.* at 618.

<sup>120</sup> *Id.* at 616 (internal citations omitted).

<sup>121</sup> See 42 U.S.C.A. § 18116(a) (West 2022).

discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.”<sup>122</sup>

Section 1557 expressly precludes discrimination on any ground prohibited under Title IX of the Education Amendments of 1972, which prohibits discrimination against an individual based on sex.<sup>123</sup> Because the ACA prohibits discrimination based on sex, which under *Bostock* and *Grimm* includes discrimination based on gender identity and sexual orientation, LGBT individuals may have legal remedies when they are denied access to healthcare. This includes bans on LGBT specific care, including exclusions of transition care related to gender dysphoria.<sup>124</sup>

In fact, courts have recognized that transgender individuals have a plausible claim for relief where transgender individuals are denied access to healthcare on the basis of their gender identity.<sup>125</sup> The United States District Court for the District of Maryland held that a transgender individual pled a plausible claim for a violation of the ACA where the Chief Medical Officer cancelled a hysterectomy of a patient on the basis that the surgery conflicted with the religious beliefs of the hospital despite the surgery being a medically necessary treatment for gender dysphoria.<sup>126</sup> The District of Maryland relied on *Bostock* and *Grimm* and found, at the motion to dismiss stage of litigation, that transgender individuals have a valid claim for a violation of the ACA on the grounds of sex-based discrimination where a policy is based on gender identity.<sup>127</sup>

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<sup>122</sup> Section 1557 of the Patient Protection and Affordable Care Act, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last visited Feb. 28, 2022).

<sup>123</sup> *Id.*; see also 20 U.S.C.A. § 1681(a) (West 2022).

<sup>124</sup> Notably, the Supreme Court of the United States denied certiorari in *Kadel v. N.C. State Health Plan for Tchrs. and State Emps.*, 12 F.4th 422 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (Mem) (2022), which alleges that the State Health Plan discriminates against transgender individuals through the categorical denial of coverage for treatments for gender dysphoria. The Plaintiffs in *Kadel* claim that the denials of coverage violate Section 1557 of the Affordable Care Act. *Id.* at 426. Although the North Carolina State Health Plan for Teachers sought dismissal of the action based on sovereign immunity, the Fourth Circuit Court of Appeals affirmed the denial of the Motion to Dismiss, allowing Plaintiffs’ claims to progress. See *id.* at 439. The Fourth Circuit’s Decision stands as a result of the Supreme Court of the United States’s denial of certiorari.

<sup>125</sup> See generally *Hammons v. Univ. of Md. Med. Sys. Corp.*, No. DKC 20-2088, 2021 WL 3190492, (D. Md. July 28, 2021); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (finding that a transgender plaintiff had a plausible claim for a violation of the ACA where health insurance providers designed and sponsored a health care plan that excluded coverage for healthcare-related to gender transition that resulted in the denial of medically necessary care); *C.P. v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791 (W.D. Wash. 2021).

<sup>126</sup> *Hammons*, 2021 WL 3190492, at \*17–18.

<sup>127</sup> *Id.* at \*18. (stating “Plaintiff plainly alleges that his hysterectomy was cancelled and that therefore he was denied necessary medical treatment, purely because of his transgender status, and

Moreover, courts have found that plaintiffs have plausible claims for sex discrimination under the ACA against health insurance providers where those providers were subject to the ACA and banned transition healthcare services for transgender individuals.<sup>128</sup> As such, blanket exclusions of healthcare services related to gender identity fall under the purview of the ACA.

*Fain v. Crouch* is imperative to access to healthcare for transgender individuals and LGBT individuals throughout Appalachia and the country. The court in reviewing plaintiffs' claims should utilize the framework set forth by the United States Supreme Court in *Bostock* and the Fourth Circuit Court of Appeals in *Grimm*. Because the ACA prohibits discrimination based on sex, which includes gender identity and sexual orientation because of *Grimm*, federal courts reviewing exclusions for health care services related to transition care and gender dysphoria should find that those exclusions violate federal law where the benefit providers receive federal funding and are subject to the ACA.

## V. IMPLICATIONS FOR RURAL COMMUNITIES

Section 1557, taken together with *Bostock* and *Grimm*, presents a clear standard of nondiscrimination by health insurers for transgender health benefits, whether publicly or privately insured. The implications are many for rural communities of transgender people.

These individuals were likelier to live in states unwilling to extend benefits to them, as evidenced in the many transgender benefit bans present in both Medicaid and public employer plans in rural states, publicly or privately.<sup>129</sup>

Discriminatory laws banning payment for transgender health care by states like the ones attempted in Iowa<sup>130</sup> or Arkansas<sup>131</sup> should also be met with no success. Despite whether these laws are struck down as unconstitutional, insurers will have to meet federal standards for nondiscrimination if they want federal money, regardless of what their states may demand of them.

State Medicaid agencies, state employer plans, and private insurers around the country would do well to proactively update their policies for the coming plan years to make plain that certain gender-affirming treatments are available, or risk lengthy legal proceedings that they will likely lose. Alternatively, failure to update policies to provide coverage for certain gender-affirming treatments may subject state and private insurers to federal agency determinations that the insurers are violating the law and subject them to complicated resolution agreements. Section 1557 is not a requirement that

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thus because of his sex. Under the logic and instruction of *Bostock*, Defendants 'inescapably' intended to rely on sex in their decision making.").

<sup>128</sup> See generally *C.P.*, 536 F. Supp. 3d 791.

<sup>129</sup> See *supra* notes 54–62.

<sup>130</sup> See *supra* notes 89–92.

<sup>131</sup> See *supra* notes 55–57.

insurers cover all forms of gender-affirming care, but insurers and state agencies and officials will no longer get away with covering nothing.

As evidence suggests, hormonal therapies and surgical therapies are cost-effective when offsetting the very real costs of untreated gender dysphoria; insurers might consider beginning there.<sup>132</sup>

Coverage for gender-affirming care will not change rural transgender health needs overnight. This is a population that has long gone without, and time will be needed to undo the damage borne by generations of health disparities and discrimination. Rural transgender people may still encounter a health care system sometimes openly hostile to them and often lacking in training for general providers, as well as access to specialty providers.

Yet access to gender-affirming health benefits may go a long way towards resolving these issues, as well. *Bostock* and Section 1557 offer a blanket security that insurers in rural states must foot the bill for some transgender care. While regulators have promised this in the past,<sup>133</sup> statutes and Supreme Court interpretations are sturdier and more easily depended on than agency interpretations prone to change with political winds. Knowing that there is certain reimbursement available for this care, specialty transgender providers may be enticed in to serve rural communities. This is especially true where private insurers, including major state employer plans, cover such benefits, owing to the higher reimbursements there than in Medicaid.

Though harder to predict, over time, hopefully, greater access to care for transgender populations may translate into less biased and more educated healthcare providers as transgender patients gain greater access to the system, forcing the need for more cultural competency.

Transgender residents of rural communities report great internal conflicts. They live in communities that are sometimes inhospitable to them. In the case of gender-affirming benefit bans, the law is actively operating to deny them an opportunity to live in their own bodies and, for some, the stakes are truly life or death. But as one interviewee said, “[t]hat doesn’t mean they’re all eager to flee. Connections to home, land, language and heritage are powerful.”<sup>134</sup> Some, but not all, transgender individuals could pick up and move to

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<sup>132</sup> See Padula et al., *supra* note 31.

<sup>133</sup> Health and Human Service officials under then-President Obama made clear in their rule interpreting Section 1557 that gender identity was a covered party against which discrimination is forbidden. Moreover, the officials stated expressly in the rule that insurers violated Section 1557 when they categorically limited or excluded gender transition services. 45 C.F.R. § 92.207(b)(4)–(5) (2016). Regulators also made clear that insurers could not limit services based on an individual’s gender identity differing from their sex as assigned at birth. *Id.* § 92.207(b)(3). Trump regulators removed these protections and generally the inclusion of gender identity as a form of sex discrimination.

<sup>134</sup> Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NPR (Mar. 12, 2019), <https://www.npr.org/sections/health-shots/2019/03/12/701510605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage>.

communities where the law is more favorable to them, where insurers and state laws afford them rights to gender-affirming care without question. For many that is not a choice. *Fain v. Crouch* and cases like it may grant transgender people the chance to finally live in the places they call home.

