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Legal Sidebar

En Banc Fourth Circuit Weighs Medicaid and State Health Plan Coverage of Certain Medical Care for Transgender Individuals

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States have recently considered the extent to which transgender individuals should have access to certain medical treatments to address a discordance between a person's sex characteristics and gender identity. While some states have enacted legislation ensuring that such services are available to transgender people, other states have policies restricting access to or otherwise limiting health coverage for them. Some of these restrictions are specific to minors, but others cover adults as well. For example, the West Virginia Medicaid program provides a blanket coverage exclusion for "transsexual surgery," and North Carolina's State Health Plan for Teachers and State Employees (NCSHP) categorically excludes coverage for treatments "leading to or in connection with sex changes or modifications."

The West Virginia Medicaid and NCSHP coverage exclusions, as well as other similar Medicaid and state health insurance coverage policies, have been challenged in federal court on the basis that the exclusions constitute sex discrimination in violation of the Fourteenth Amendment's Equal Protection Clause and Section 1557 of the Patient Protection and Affordable Care Act (ACA), among other claims. District and appellate courts across the country considering similar coverage exclusions have arrived at different conclusions, disagreeing about the appropriate level of scrutiny to be applied. For example, a Wisconsin federal district court held that the state health plan's exclusion of coverage for "surgery and sex hormones associated with gender reassignment" violated the Equal Protection Clause and Section 1557. (The parties agreed to voluntarily dismiss their cross-appeals to the Seventh Circuit.)

With respect to Medicaid coverage, the Northern District of Florida held that a state law banning Medicaid reimbursements for "sex reassignment prescriptions or procedures," violated the Equal Protection Clause and Section 1557 of the ACA, among other federal laws. The decision was appealed to and is currently pending before the Eleventh Circuit. On the other hand, in denying to preliminarily enjoin enforcement of the state Medicaid program's coverage ban of "gender reassignment surgeries" for minors, an Arizona district court reasoned, in part, that the plaintiffs had not sufficiently demonstrated that such surgeries were medically necessary, safe, or effective for treating gender dysphoria because the record contained conflicting expert opinions on those issues. The Ninth Circuit affirmed. (The litigation in the Arizona district court was voluntarily dismissed in 2022 prior to any final decision on the merits.)

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Against this backdrop, in *Fain v. Crouch*, a West Virginia federal district court held that the state's Medicaid reimbursement ban for "transsexual surgery…regardless of medical necessity," violated the Equal Protection Clause and Section 1557. Similarly, in *Kadel v. Folwell*, a North Carolina district court held that the NCSHP's coverage exclusion for "treatment…in connection with sex changes or modifications and related care" violated the Equal Protection Clause. Both decisions were appealed to the Fourth Circuit, and different three-judge panels heard oral arguments in each case. The Fourth Circuit has held, in a different context, that transgender status was a sex-based classification and a quasi-suspect class. On September 21, 2023, the Fourth Circuit, on its own motion, decided to rehear oral arguments in both cases before the entire circuit. This Sidebar discusses the district court decisions and the arguments made by the parties before the *en banc* Fourth Circuit with respect to the challenges brought under the Equal Protection Clause and Section 1557.

Legal Background

Equal Protection

The Equal Protection Clause provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." To withstand scrutiny under the Equal Protection Clause, a law may only treat similarly situated persons differently if there is a sufficient reason to do so. The strength of the justification required depends on the type of classification. "Rational basis" review applies to most laws. It requires only that the government's justification be "rationally related to a legitimate state interest." A much more exacting standard—strict scrutiny—applies to government action that distributes burdens or benefits based on race, ethnicity, or national origin. To pass strict scrutiny review, a government measure must be narrowly tailored to serve a compelling government interest.

Some government classifications are reviewed using a standard in between rational basis and strict scrutiny. The Supreme Court has called sex-based classifications quasi-suspect because they are often based upon "outdated misconceptions" or "loose-fitting characterizations" of gender. Quasi-suspect classifications are subject to "intermediate scrutiny," under which the government must show that the law is "substantially related" to an "important government interest." To date, the Supreme Court has not decided whether differential treatment of transgender persons is subject to a heightened standard of review, and lower courts have diverged on this question. The Fourth Circuit held that transgender status is a sex-based classification, and that it is a quasi-suspect classification in its own right. Similarly, the Eighth Circuit held that a state law restricting gender transition procedures creates a sex based classification subject to intermediate scrutiny. The Sixth Circuit, in contrast, applied rational basis in its review of state restrictions of gender-transition treatments for minors.

Section 1557

Section 1557 of the ACA contains various antidiscrimination requirements that apply to certain health programs or activities. The statute provides that a person, "shall not . . . be subjected to discrimination under[] any health program or activity, any part of which is receiving Federal financial assistance . . ." and incorporates by reference Title IX of the Education Amendments of 1972's prohibition on sex discrimination. On several occasions since the ACA became law in 2010, the U.S. Department of Health and Human Services (HHS) has proposed regulations under Section 1557, which have since become the subject of litigation and public controversy. For example, Section 1557 does not define "health program or activity," and HHS's interpretation of the term has varied across administrations. Most recently, in July 2022, HHS issued a notice of proposed rulemaking under Section 1557, which differs in many respects from the agency's existing regulations.

The initial Section 1557 regulations, finalized in 2016, defined "health program or activity" to include entities "engaged in providing or administering … health coverage," which would have subjected all of the operations of any health insurance company receiving federal funds to Section 1557. The 2020 revised rules declared that "health programs or activities" did not include health insurance companies, which substantially narrowed Section 1557's application. The 2020 revised rules also eliminated certain "overbroad provisions related to sex and gender identity." The 2022 proposed rules would broaden "health program or activity" to include an entity that assists individuals in obtaining health services, provides health insurance coverage, educates health care providers, provides clinical care, or undertakes health research.

The proposed rules further rely on the Supreme Court's ruling in *Bostock v. Clayton County* to support HHS's position that, by prohibiting sex discrimination, Section 1557 prohibits sexual orientation and gender identity discrimination. The Court in *Bostock* held that a provision in Title VII of the Civil Rights Act of 1964 prohibiting discrimination in the workplace "because of … sex" forbids employers from making employment decisions based on an employee's sexual orientation or gender identity. The Biden Administration has taken the view that *Bostock*'s reasoning applies to other federal statutes addressing sex discrimination outside the Title VII context, including in Title IX's prohibition on sex discrimination that is incorporated by reference into Section 1557. (For more discussion, see this CRS report.)

District Court Decisions

Equal Protection Clause

In both *Kadel* and *Fain*, the district courts held that the coverage limitations in the NCSHP and West Virginia Medicaid plan violated the Equal Protection Clause. In both cases, the courts relied on the Fourth Circuit's reasoning in *Grimm v. Gloucester County Sch. Bd.*, which struck down a school bathroom policy that required students to use bathrooms that aligned with their "biological sex" rather than their gender identity. The *Grimm* court held that the policy discriminated on the basis of sex, and that transgender status is a quasi-suspect classification that triggers intermediate scrutiny in its own right.

The *Kadel* and *Fain* courts rejected the states' arguments that the West Virginia Medicaid plan and NCHSP excluded coverage on the basis of diagnosis, rather than sex. West Virginia and NCSHP argued that the treatments were excluded from coverage based on specific diagnoses for conditions like gender dysphoria, and therefore the exclusions were based on that diagnosis rather than sex, gender, or transgender status. The *Kadel* and *Fain* courts disagreed, holding that, like the bathroom policy in *Grimm*, the plans discriminated on the basis of sex and transgender status. The *Kadel* court noted that the plans' exclusion of "[t]reatment or studies leading to or in connection with *sex* changes or modifications and related care," are not based on a particular diagnosis, but are based on alignment "with the member's biological sex." The *Kadel* and *Fain* courts also said that under the reasoning set forth in *Bostock*, discrimination on the basis of gender dysphoria is sex-based discrimination. Just as a person cannot determine their sexual orientation without referring to their sex, a patient cannot determine whether they have gender dysphoria without considering their sex. Accordingly, the courts applied intermediate scrutiny.

The district courts also rejected the states' arguments that the bans were justified by cost savings and the alleged ineffectiveness of the treatments. With regard to cost savings, the *Kadel* court cited Supreme Court precedent that cost savings are not a sufficiently important government interest to satisfy heightened scrutiny, and the *Fain* court noted that the evidence of record contradicted any justification based on cost savings. The courts also rejected the arguments that the excluded treatments were ineffective. The *Fain* court found West Virginia's justification regarding ineffectiveness of treatment to be "wholly unsupported by the record, and … refuted by the majority of the medical community." Similarly,

while the *Kadel* court agreed with the state that it "has an obvious interest in protecting its employees and their families from ineffective medical treatments," the court held that the record did not show that the treatments were ineffective or that the risks outweighed the benefits. Furthermore, the *Kadel* court said that the state's concern would be addressed through a sex-neutral policy by distinguishing between medically necessary and unnecessary treatments in the plan without excluding *all* care related to "gender dysphoria."

Section 1557

In *Fain*, the court found that the West Virginia Medicaid exclusion violated Section 1557. The court stated that to violate Section 1557, the defendant must be a federally funded health program or activity, and the plaintiff must be "subjected to discrimination in healthcare services on the basis of sex." West Virginia conceded that its Medicaid program, which receives federal dollars, met the definition of health program or activity under Section 1557. Relying on the Supreme Court's analysis in *Bostock*, where the Supreme Court held that Title VII's prohibition on sex discrimination in employment includes discrimination on the basis of sexual orientation and gender identity, the court found that the challenged policy facially discriminated against the plaintiffs on the basis of sex. The court observed, "[A] transgender identity is inherent in an individual who suffers from gender dysphoria. Transgender status, and thus, th[e] exclusion, cannot be understood without a reference to sex."

In *Kadel*, the court similarly reasoned that *Bostock* informed whether the state's coverage exclusion violated Section 1557 by discriminating on the basis of sex. The NCSHP argued, however, that it did not violate Section 1557, because it was not a "health program or activity," as it was excluded under the 2020 revised rules as an entity "principally or otherwise engaged in the business of providing health insurance." The court pointed out that the 2020 revised rule had been challenged and noted HHS's stated intent to change it via the 2022 proposed rule. It appears that the proposed rule's revised definition of "health program or activity" could change the outcome of the case. The court decided to "reserve judgment" on the ACA issue.

Arguments Before the *En Banc* Fourth Circuit

After oral arguments were held by separate three-judge panels, but before the panels issued decisions, the Fourth Circuit ordered rehearing *en banc* so that the cases would be reargued together and decided by the entire court. Whether the North Carolina and West Virginia plan exclusions survive the plaintiffs' constitutional challenges may well depend on what level of scrutiny the Fourth Circuit applies. West Virginia and the NCSHP argued that the plans do not facially discriminate against transgender individuals or on the basis of sex because they do not distinguish between transgender and nontransgender patients. To support this argument, the states relied on the Supreme Court's holding in *Geduldig v. Aiello*, wherein a disability insurance plan that excluded coverage for pregnancy-related conditions did not run afoul of the Equal Protection clause. While stating "it is true that only women can become pregnant," the Court reasoned that the class of nonpregnant people includes both women and men and that under the terms of the plan, "there is no risk from which women are protected and men are not." The states argued that *Geduldig* applies to the instant cases, because transgender people were excluded from coverage for only some medical care, and because not all transgender people sought the excluded care, the plans did not facially discriminate on the basis of sex or transgender status. Finally, the states argued that, in keeping with *Geduldig*, rational basis review should apply, because the classification at issue refers not to sex or transgender people but instead to specific medical procedures and diagnoses.

In response, the plaintiffs in *Kadel* and *Fain* argued that the district court was correct that *Geduldig* did not apply. They observed that while pregnancy is an "objectively identifiable physical condition" that can be determined without regard to gender, sex is a necessary factor in determining whether the NCSHP and

Medicaid plan covered certain medical care. The plaintiffs pointed to the existing Fourth Circuit's decision in *Grimm*, which found that heightened scrutiny applied to a school restroom policy that assigned students to a restroom based on sex because transgender people constituted a quasi-suspect class. The plaintiffs in *Kadel* and *Fain* argued that, as in *Grimm*, the NCSHP and Medicaid exclusions "cannot be stated or effectuated without referencing sex," and thus that the policies should receive intermediate scrutiny.

The parties in *Fain* also sparred over the application of Section 1557, with West Virginia arguing that *Bostock* is inapplicable because its holding was limited to sex-based employment discrimination claims under Title VII. The state further asserted that the appropriate question under Section 1557 is whether the plan distinguishes between members based on their binary sex, that is, their status as "male" or "female." West Virginia argued that it did not violate Section 1557 because the Medicaid policy applied "uniformly" to all beneficiaries. The *Fain* plaintiffs countered that West Virginia's "binary sex" theory was inconsistent with *Grimm*, which recognized *Bostock*'s relevance to sex discrimination claims outside of the employment context. The plaintiffs argued that even if West Virginia's policy is applied "uniformly," it violates Section 1557 because it "designates certain services as non-covered" on the basis of sex and transgender status.

During the oral arguments, the judges on the *en banc* Fourth Circuit panel seemed to disagree on whether policies limiting health coverage for transgender people triggered heightened scrutiny. One judge appeared skeptical that courts should interfere with a state or plan's decisions about what health care coverage to provide. Another judge said that an equal protection challenge requires a substantial disadvantage to a traditional suspect classification, and that to consider those suffering from gender dysphoria a suspect classification is a significant departure from current precedent. Another commented that transgender people face significant discrimination, which has always been the reason for considering a classification suspect. Some panelists also expressed skepticism about whether the diagnosis of gender dysphoria could be made without reference to sex or gender identity. The cases remain pending at the Fourth Circuit, and a decision could be issued at any time.

Considerations for Congress

States have taken different approaches to coverage and reimbursement for certain medical treatments for transgender people. As a result, a transgender individual's ability to access such treatments may depend on factors like their state of residence and coverage type. As litigation on Medicaid and state health plan coverage continues, Congress may consider the potentially wide-reaching implications of federal appellate court decisions that apply rational basis, intermediate, or other levels of scrutiny to state policies or laws excluding transgender individuals in any context. Such decisions might determine whether or not gender identity or transgender status are considered sex-based classifications, or quasi-suspect classifications in their own right, in that circuit, which could implicate state insurance plans that exclude coverage of certain types of medical care for transgender people. Relevant circuit court decisions may also arise from, for example, challenges to laws and policies regulating the gender of students on school sports teams.

Decisions in different contexts may be limited in scope; not every decision analyzing gender identity-based classifications under the Equal Protection Clause will necessarily control in other cases. Nonetheless, the level of scrutiny applied to gender identity-based classifications in any context, as well as the reasoning underlying that determination, may inform both federal courts and lawmakers as they continue to grapple with this topic.

With respect to Section 1557, Congress could take no action and allow federal courts to continue interpreting Section 1557. Alternatively, Congress could weigh in on whether or to what degree health insurance plans should be covered by Section 1557, and whether Section 1557 prohibits discrimination on

the basis of gender identity. Similarly, Congress could amend the Medicaid statute to clarify whether medical care for transgender people should be covered, or it could direct the Secretary of HHS to undertake rulemaking to this effect. As noted above, the constitutionality of differential treatment on the basis of transgender status is unsettled and the subject of conflicting lower court decisions. The degree to which Congress could legislatively direct differential treatment under Section 1557 is likely to remain uncertain in the absence of a Supreme Court decision on the appropriate level of scrutiny to be applied.

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