

1 STEP FORWARD 2 STEPS BACK: THE TRANSGENDER INDIVIDUAL RIGHT TO ACCESS OPTIMAL HEALTH CARE

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I. INTRODUCTION

Transgender individuals habitually experience prejudice and discrimination while accessing healthcare, causing a number of health inequalities to emerge.¹ This vulnerable community already has minimal access to healthcare due to fear of bigotry, harassment, and/or intolerance.² For a brief moment, many have found solace under the Obama administration, when The Patient Protection and Affordable Care Act (“ACA”) passed.³ It extended civil rights protections, such as nondiscrimination based on sex, to include gender identity.⁴ Under the Obama administration, gender identity was interpreted as “an individual’s internal sense of gender, which may be different from that individual’s sex assigned at birth”.⁵ However, the U.S. Department of Health and Human Services (“HHS”), under the Trump administration, issued a policy change in June of 2019, which rolled back Obama era protections for transgender patients under Section 1557 of the ACA.⁶ The current policy drastically reinterprets the word sex to mean male or female as determined by biology.⁷ This interpretation is causing more harm than good for the transgender

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¹ Alexis M. Florczak, *Make America Discriminate Again? Why Hobby Lobby’s Expansion of RFRA Is Bad Medicine for Transgender Health Care*, 28 HEALTH MATRIX 431, 436 (2018).

² Corinne Lewis et al., *Federal Government Eliminates Health Care Protections for Transgender Americans*, THE COMMONWEALTH FUND (June 19, 2020), <https://www.commonwealthfund.org/blog/2018/federal-protections-health-care-risk-transgender-americans>.

³ Selena Simmons-Duffin, *Transgender Health Protections Reversed by Trump Administration*, NPR (June 12, 2020), <https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration>.

⁴ HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs, U.S. DEP’T OF HEALTH & HUMAN SERVICES (June 12, 2020), <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>.

⁵ Alisha Haridasani Gupta, *Transgender People Face New Legal Fight After Supreme Court Victory*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/09/03/us/transgender-supreme-court-healthcare.html>.

⁶ Stephanie Armour, *Trump Administration Issues Rule to Roll Back Transgender Protections in the Affordable Care Act*, WALL ST. J. (June 12, 2020), <https://www.wsj.com/articles/trump-administration-issues-rule-to-roll-back-transgender-protections-in-the-affordable-care-act-11591992461>.

⁷ *Id.*

community.⁸ This is evident as the new interpretation is making it easier for health care providers to cite religious reasons to justify their discriminatory practices in denying health care services to transgender individuals.⁹ Thus, the new interpretation not only reduces transgender individuals' access to healthcare, but it also eliminates a platform for transgender individuals to seek justice on a sex discrimination claim.¹⁰ Trump's policy is an attack on the natural rights of transgender individuals.¹¹ Every person, regardless of the gender they identify as should have equal and optimal access to healthcare.¹²

The current interpretation of Section 1557 of the ACA leaves transgender individuals in a vulnerable state.¹³ The policy behind the ACA was to prohibit discrimination under any health program or activity receiving federal financial assistance on the grounds of race, color, national origin, sex, age, or disability.¹⁴ However, the new interpretation has the opposite effect.¹⁵ The new law is making it easier for health care providers to discriminate against transgender individuals by citing to religious beliefs for their actions.¹⁶ Physicians, private hospitals, and insurance providers can now refuse to treat, accept, and/or otherwise insure individuals whose sense of gender is different from that assigned to them at birth.¹⁷ Under this rule, an insurance provider could refuse coverage for surgery like a mastectomy¹⁸ even though surgery would be covered in similar circumstances for cisgender.¹⁹ A cisgender is a person whose gender identity corresponds with the sex the person was identified as having at birth.²⁰ A health care provider could also deny a transgender man treatment for ovarian cancer or coverage for a hysterectomy.²¹ This is the exact type of prejudice that causes more transgender individuals to

⁸ Simmons-Duffin, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Ryan Thoreson, *Anti-LGBT Discrimination in US Health Care*, HRW (July 23, 2018), <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

¹³ *Id.*

¹⁴ Simmons-Duffin, *supra* note 3.

¹⁵ Gupta, *supra* note 5.

¹⁶ Simmons-Duffin, *supra* note 3.

¹⁷ *Id.*

¹⁸ A mastectomy is surgery that a primary care provider deems essential to cure a patient's gender dysphoria.

¹⁹ *Id.*

²⁰ *Cisgender*, MERRIAM-WEBSTER (1994).

²¹ Simmons-Duffin, *supra* note 3.

become weary of pursuing health care services.²² One in four transgender individuals have delayed or avoided preventive health care, such as pelvic exams, out of fear of mistreatment due to their gender identity.²³ This fear is not unwarranted. Transgender individuals often avoid simple routine medical exams, such as pelvic exams, because the exams could lead to their genitalia becoming exposed.²⁴ Furthermore, when such exposure occurs more often than not the health care provider either harass the transgender patient by asking inappropriate questions and/or the health care provider refuses to treat the transgender patient.²⁵ It is extremely common in the transgender community to hide one's gender identity from their health care provider.²⁶ This occurrence is unsurprising considering "28 percent of transgender individuals report experiencing verbal harassment in a medical setting and 19 percent report having been refused medical care by providers because of their gender identity."²⁷ This inability to access non-discriminatory health care services can contribute to exacerbated health disparities, such as increased rates of mental illness, sexually transmitted diseases, and/or drug and alcohol abuse.²⁸ The Trump administration's current interpretation of the nondiscrimination provision of the ACA is contributing to more fear of improper health care treatment among the transgender community.²⁹ For what once was a bright future towards gender equality between members of the LGBTQ community and cisgenderers is now a dimming light until action is taken to combat these discrepancies.

This Note will examine the substantial disparity and scrutiny transgender individuals face in accessing health care in America through a contemporary perspective. Furthermore, it discusses the negative ideologies harbored by health care providers regarding transgender individuals' mental health.³⁰ Moreover, this Note discusses the discrimination transgender individuals were facing in the military because of their gender identity.³¹ As well as the

²² Gupta, *supra* note 5.

²³ Florczak, *supra* note 1, at 437.

²⁴ Gupta, *supra* note 5.

²⁵ *Id.*

²⁶ Lewis et al., *supra* note 2

²⁷ *Id.*

²⁸ *Id.*

²⁹ Florczak, *supra* note 1, at 458.

³⁰ *Id.* at 433.

³¹ Michele Goodwin & Erwin Chemerinsky, *The Transgender Military Ban: Preservation of Discrimination Through Transformation*, 114 NW. U. L. REV. 751, 751 (2019).

diminishing rights the transgender community has acquired because of the current interpretation of Section 1557 of the ACA and Trump's ban of transgender individuals in the military.³² However, it also provides a discussion on how to protect transgender rights in health care and the necessary structural changes that are essential to effect change.

II. HISTORY OF TRANSGENDER ACCESS TO MEDICAL CARE

Transgender individuals in the United States have historically been stigmatized by the medical community.³³ Up until 2012, the American Psychiatric Association ("APA") used the diagnosis of "gender identity disorder" to indicate there was something inherently wrong with people who did not conform to the sex they were assigned at birth.³⁴ Labeling gender nonconformity as a mental disorder as a classification was so disheartening to the transgender community because governments around the world would use this characterization as the basis for discriminatory policies.³⁵ Policies that required a "gender disorder" diagnosis as a precondition for changing transgender individual's names and gender markers on official documents were necessary for transgender individuals before they could be recognized as their true gender before the law.³⁶ Mandating transgender individuals to be labeled as having a "mental disorder" was not only harmful but also misguided.³⁷

Subsequently, in 2013, the APA changed its manual to eradicate the term "gender identity disorder" and instead added the term "gender dysphoria".³⁸ The APA added the term with a specific definition that it refers to emotional distress over "a marked incongruence between one's experienced/expressed gender and assigned gender."³⁹ This was a significant leap in gender equity for the transgender community, because experiencing a gender different from

³² *Id.*

³³ Peter W. Schroth et al., *Perspectives on Law and Medicine Relating to Transgender People in the United States*, 66 AM. J. COMP. L. 91, 95 (2018).

³⁴ Florczak, *supra* note 1, at 433.

³⁵ *New Health Guidelines Propel Transgender Rights*, HRW (May 27, 2019), <https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

the one assigned at birth is no longer constituted as a mental disorder, but rather a natural variation of human experience.⁴⁰

In May 2019, the term the World Health Organization (“WHO”) used to describe transgender individuals, “gender incongruence”, was moved to the organization’s sexual health chapter from its mental disorder chapter.⁴¹ Dr. Lale Say, the coordinator of WHO’s Adolescents and at-Risk Population team, said the term “was taken out from the mental health disorders because we had a better understanding that this wasn’t a mental health condition, and leaving it there was causing stigma.”⁴² By changing the class of this condition, transgender adolescents and adults are now able to seek medical care without being regarded as mentally ill.⁴³

Despite this step towards gender inclusion, LGBTQ individuals continue to experience discrimination when seeking health care, due to the medical professional’s own stigmatization of this community.⁴⁴ Most practitioners do not receive sufficient, if any, training in medical school for treating transgender patients.⁴⁵ Numerous transgender individuals have reported that their health care provider has very minimal knowledge about treating transgender patients and that they are often the ones who educate their treating clinician about appropriate care.⁴⁶ This is not acceptable. Physicians need to be more knowledgeable about caring for transgender patients in order to provide beneficial, satisfactory, and competent care.⁴⁷ “Ironically, more information can at times be a double-edged sword.”⁴⁸ The National LGBTQ Task Force research demonstrated that “awareness of a transgender patient’s ‘gender identity often lead providers to discriminate against him or her.”⁴⁹ Examples of such discrimination include, but are not limited to, asking transgender patients invasive questions unrelated to their medical care, declining to provide them with health-care services related to gender transitioning, and using

⁴⁰ *Id.*

⁴¹ Jessica Ravitz et al., *Transgender People are Not Mentally Ill, the WHO Decrees*, CNN (May 28, 2019), <https://www.cnn.com/2019/05/28/health/who-transgender-reclassified-not-mental-disorder/index.html>.

⁴² *Id.*

⁴³ *New Health Guidelines Propel Transgender Rights*, *supra* note 35.

⁴⁴ Florczak, *supra* note 1, at 432.

⁴⁵ *Id.* at 437.

⁴⁶ *Id.* at 438.

⁴⁷ *Id.*

⁴⁸ *Id.* at 437-38.

⁴⁹ *Id.*

offensive language towards transgender individuals.⁵⁰ This is why protection under Section 1557 of the ACA under the Obama administration was so important to the transgender community.⁵¹ Section 1557 is the first of its kind to provide transgender individuals a legal right of action for sex discrimination that is specifically occurring in the health care setting.⁵²

III. HISTORY OF SECTION 1557 OF THE AFFORDABLE CARE ACT

The passing of Section 1557 of the ACA, by the Obama administration in 2016⁵³, was a significant leap for gender equality for transgender individuals.⁵⁴ Prior to Section 1557, there were no extensive protections in health care for sex discrimination.⁵⁵ Section 1557 of the ACA prohibited discrimination by any health program or provider, receiving federal financial assistance, to refuse to treat an individual based on race, color, national origin, sex, age, or disability.⁵⁶ The U.S. Department of Health and Human Services goes on to state the rule interpreted gender identity as an individual's internal sense of gender.⁵⁷ An internal sense of gender can be identified as male, female, neither, or a combination of male and female, and which may be different from an individual's physical sex assigned at birth.⁵⁸ The ACA under the Obama administration was meaningful because it was the first federal civil rights law to specifically bar private or public health care providers from discriminating based on someone's gender identity.⁵⁹ This constitutes a form of sex discrimination which was determined to be illegal under Title IX of the Education Amendment of 1972.⁶⁰ Furthermore, under the Obama administration, the law stated that an example of sex stereotypes "can also include a belief that

⁵⁰ *Id.*

⁵¹ *Id.* at 458.

⁵² *Id.* at 442.

⁵³ On June 19, 2020, the Trump administration rolled back the part of Section 1557 of the Patient Protection and Affordable Care Act which prohibited discrimination based on sex which interpreted "sex" to include one's gender identity.

⁵⁴ Valarie K. Blake, *Remediating Stigma-Driven Health Disparities in Sexual Minorities*, 17 HOUS. J. HEALTH L. & POL'Y 183, 222 (2017).

⁵⁵ *Id.*

⁵⁶ 45 C.F.R. § 92.1.

⁵⁷ *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670-72 (N.D. Tex. 2016).

⁵⁸ *Id.* at 671.

⁵⁹ Timothy Wang et al., *What the New Affordable Care Act Nondiscrimination Rule Means for Providers and LGBT Patients*, THE FENWAY INSTITUTE (Sept. 2016), <https://fenwayhealth.org/wp-content/uploads/HHS-ACA-1557-LGBT-Non-Discrimination-Brief.pdf>.

⁶⁰ *Id.*

gender can only be binary and thus that individuals cannot have a gender identity other than male or female.”⁶¹ Therefore, the passing of Section 1557 not only encouraged transgender sensitivity and inclusion, but it also created protection for transgender individuals because the law acknowledges that there was a wide spectrum of gender identities beyond male and female.⁶² Under this law, health care providers and insurance companies could no longer refuse medically appropriate treatment based on one’s gender identity or exclude transition-related care.⁶³ Health care providers had to provide equivalent access to coverage, services, and care to transgender individuals as they would to cisgender people.⁶⁴ “Health care providers could no longer decline to provide transgender men reproductive health services on the basis that the services are traditionally only provided to women.”⁶⁵ The passing of the nondiscrimination provision of Section 1557 of the ACA meant that the transgender community was finally on the path towards gender equality.⁶⁶

Shortly thereafter, the Franciscan Alliance, several states, and three private healthcare providers (“Franciscans”) challenged the U.S. Department of Health and Human Services (“Defendant”) interpretation of “sex discrimination” in Section 1557 of the ACA in *Franciscan Alliance v. Burwell*.⁶⁷ Specifically, “[Franciscans] challenge[d] the law’s interpretation of discrimination ‘on the basis of sex’ under Title IX as encompassing ‘gender identity’.”⁶⁸ Franciscans contended the law violated the Administrative Procedure Act (APA) and the Religious Freedom Restoration Act (RFRA).⁶⁹ Franciscans alleged that because Section 1557 incorporated the statutory prohibition of sex discrimination in Title IX, its scope should be limited to the unambiguous definition of “sex” as the immutable, biological differences between males and females “as acknowledged at or before birth”.⁷⁰ Therefore, the Obama administration’s interpretation of sex violated the APA because it exceeded statutory authority by

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Blake, *supra* note 54, at 222.

⁶⁷ *Franciscan*, 227 F. Supp. 3d at 670.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 671.

interpreting Title IX's prohibition of sex discrimination to include gender identity and by failing to include the religious exemptions of Title IX, rendering it contrary to law.⁷¹ Franciscans also alleged the current interpretation violated RFRA because the interpretation of sex discrimination pressured doctors to deliver healthcare in a manner that violated their religious freedom and thwarted their independent medical judgment.⁷² The Texas' Court held Section 1557 of the ACA violated the APA and RFRA by contradicting current law; exceeding its authority by interpreting Title IX's "sex discrimination" to include gender identity; and by failing to include the religious and abortion exemptions of Title IX.⁷³ Judge O'Connor issued a nationwide preliminary injunction.⁷⁴ The result of the injunction was that the U.S. Department of Health and Human Services was barred from enforcing the part of Section 1557 that prohibited discrimination based on gender identity.⁷⁵

Following the decision in *Franciscan Alliance v. Burwell*,⁷⁶ the U.S. Department of Health and Human Services in *Franciscan Alliance v. Azar*,⁷⁷ filed a motion to remand and stay litigation.⁷⁸ In other words, halting litigation until the HHS finalizes their reinterpretation of "sex discrimination".⁷⁹ The Texas Court granted HHS two years to complete its review and amend the law at issue.⁸⁰ In October 2019, after the HHS proposed its new law reinterpreting "sex" to mean the gender given at birth, Judge O'Connor issued a final decision vacating and remanding parts of Section 1557 which related to gender identity.⁸¹ Judge O'Connor adopted the same reasoning outlined in his 2016 decision regarding the preliminary injunction.⁸²

In June 2020, under the Trump Administration, the U.S. Department of Health and Human Services issued a finalized policy change that rolled back the nondiscrimination protections for

⁷¹ *Id.* at 685.

⁷² *Id.* at 671-72.

⁷³ *Id.* at 686, 693.

⁷⁴ *Id.* at 696.

⁷⁵ *Id.*

⁷⁶ *Franciscan*, 227 F. Supp. 3d at 670.

⁷⁷ *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

⁷⁸ *Id.* at 932.

⁷⁹ *Id.*

⁸⁰ *Id.* at 933.

⁸¹ *Id.* at 946.

⁸² *Id.*

transgender individuals under Section 1557 of the ACA.⁸³ The HHS stated that they will “enforce Section 1557 by returning to the government’s interpretation of sex discrimination according to the plain meaning of the word ‘sex’ as male or female and as determined by biology.”⁸⁴ The HHS’ reinterpretation of the provision was to address legal concerns and inconsistencies with other civil rights provisions.⁸⁵ Many have applauded the new interpretation of Section 1557.⁸⁶ Individuals like Dr. Jeff Barrows, the Christian Medical Association’s Executive Vice President for Bioethics and Public Policy, stated, “health professionals know they must base medical decisions on biology and science, not ideology.”⁸⁷ However, this statement has no truth to it.⁸⁸ The new interpretation allows health care providers all across the United States to deny service because the patient’s sexual orientation or gender identity did not align with the provider’s personal or religious beliefs.⁸⁹ This form of discrimination was not only immoral but should have been unlawful under the ACA.

IV. TRANSGENDER ACCESS TO HEALTHCARE IN THE MILITARY

Previously, the Trump administration used health disparities, such as gender dysphoria, which numerous members of the transgender community are facing to bar transgender individuals from serving in the military.⁹⁰ This administration used the transgender community reality of having gender dysphoria and further perpetrated it as a serious mental illness that prevented them from contributing to society.⁹¹ In other words, the Trump administration was alluding to the notion that transgender individuals are incompetent in fighting for the safety and protection of every U.S citizen’s rights because of their

⁸³ Armour, *supra* note 6.

⁸⁴ 85 Fed. Reg. 37160-37248 (June 19, 2020), <https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority>.

⁸⁵ The District Court in *Franciscan All., Inc. v. Burwell*, found that ACA Section 1557’s inclusion of gender identity in the definition of sex discrimination violated the Administrative Procedures Act and the Religious Freedom Restoration Act.

⁸⁶ Armour, *supra* note 6.

⁸⁷ Simmons-Duffin, *supra* note 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Goodwin & Chemerinsky, *supra* note 31, at 775.

⁹¹ *5 Things to Know About DOD’s New Policy on Military Service by Transgender Persons and Persons With Gender Dysphoria*, U.S. DEPT OF DEFENSE (Mar. 13, 2019), <https://www.defense.gov/Explore/News/Article/1783822/5-things-to-know-about-dods-new-policy-on-military-service-by-transgender-perso/>.

gender dysphoria.⁹² The same administration believed the military’s “readiness” and “lethality” would be burdened and impaired by having to assist transgender service members to cope with their “mental illness.”⁹³ On July 26, 2017, President Trump wrote on Twitter that “the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military.”⁹⁴ He continued on to tweet, “our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.”⁹⁵ The medical costs he is referring to are associated with gender dysphoria, gender transition treatment, and sex reassignment surgery.⁹⁶ Trump’s policy was blatantly and unjustifiably discriminatory based on gender identity with no legitimacy to it.⁹⁷

There was no evidence to support Trump’s claim that transgender health care services were a burden on the military’s budget.⁹⁸ A study by the RAND Corporation estimated transgender servicemember’s medical services would cost the military between \$2.4 million and \$8.4 million annually.⁹⁹ \$8.4 million of that total spending accounts for psychotherapy, while the rest accounts for coverage related to hormone prescriptions and gender transition surgeries.¹⁰⁰ Even in the most extreme case, \$8.4 million is a small amount compared to what the military spends on sexual health care.¹⁰¹ For instance, according to an analysis by the *Military Times*, the military spends \$84 million on erectile dysfunction medicine annually for active service members.¹⁰² The military spends \$41.6 million of that \$84 million on

⁹² Julie Moreau, *Year After Trans Military Ban, Legal Battle Rages On*, NBC NEWS (Apr. 11, 2020), <https://www.nbcnews.com/feature/nbc-out/year-after-trans-military-ban-legal-battle-rages-n1181906>.

⁹³ Goodwin & Chemerinsky, *supra* note 31, at 772-73.

⁹⁴ Abby Phillip, *Trump Announces that He Will Ban Transgender People from Serving in the Military*, THE WASHINGTON POST (JULY 26, 2017), https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?utm_term=.7fc27bf877a5&itid=lk_inline_manual_2

⁹⁵ Christopher Ingraham, *The Military Spends Five Times as Much on Viagra as it Would on Transgender Troops’ Medical Care*, THE WASHINGTON POST (July 26, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/26/the-military-spends-five-times-as-much-on-viagra-as-it-would-on-transgender-troops-medical-care/>.

⁹⁶ *Id.*

⁹⁷ Goodwin & Chemerinsky, *supra* note 31, at 757.

⁹⁸ *Id.* at 753.

⁹⁹ Ingraham, *supra* note 95.

¹⁰⁰ Goodwin & Chemerinsky, *supra* note 31, at 780.

¹⁰¹ *Id.*

¹⁰² Ingraham, *supra* note 95.

Viagra alone.¹⁰³ The \$41.6 million the military spends on Viagra is approximately five times the estimated spending amount for transition-related medical care for transgender servicemembers.¹⁰⁴ Thomas Spoehr, the director of The Heritage Foundation’s Center for National Defense, defended Trump’s ban by stating, “the military has to work with the preponderance that the data and evidence say[s] people with gender dysphoria are at much greater risk of harming themselves and not being at their best.”¹⁰⁵ Gender dysphoria is a condition of extreme distress from not identifying with one’s biological gender, a condition synonymous with the transgender community.¹⁰⁶ A disorder that can be alleviated by using medical resources.¹⁰⁷ It is imperative that transgender individuals are not singled out for their use of available military health services no more than women who use contraceptives, cis men who use erectile dysfunction medication to treat their impotence, or officers who suffer from PTSD who seek psychological services.¹⁰⁸

Trump’s ban on transgender individuals in the military was not only discrimination based on sex, but an attack on transgender rights.¹⁰⁹ The transgender community had only recently obtained rights under the Obama administration to serve openly in the military and receive proper care related to their transition.¹¹⁰ Under the Trump administration, the Department of Defense’s regulation instructed military secretaries to add gender dysphoria to service-specific lists of disqualifying conditions which, in fact, would cause the military to kick out transgender service members who refuse to serve as the sex given to them at birth.¹¹¹ President Trump upheld this decision based on an illegitimate justification that, “our military must be focused on decisive and overwhelming...victory and cannot be burdened with tremendous medical costs and disruption that transgender in the military would

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Julie Watson & Jennifer McDermott, *Transgender Care Cost Military Less than 1 Percent of its Health Budget Since 2016*, PBS (Feb. 27, 2019), <https://www.pbs.org/newshour/nation/military-spent-about-8-million-on-transgender-care-since-2016>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Goodwin & Chemerinsky, *supra* note 31, at 780.

¹⁰⁹ *Id.* at 753.

¹¹⁰ Julie Watson, *Military Transgender Policy Scientifically Deficient, American Medical Association Says*, PBS (Apr. 11, 2019), <https://www.pbs.org/newshour/health/militarys-transgender-policy-scientifically-deficient-american-medical-association-says>.

¹¹¹ Watson, *supra* note 110.

entail.”¹¹² It is important to remember that there is no evidence to support this statement that transgender individuals will harms military’s effectiveness, readiness, or lethality.¹¹³ The American Medical Association (“AMA”) stated, “troubled that the Department of Defense [under the Trump administration] characterizes the need to undergo gender transition as a ‘deficiency’.”¹¹⁴ Moreover, the AMA had said repeatedly “that there [was] no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service.”¹¹⁵ The only thing deficient was any medical science behind Trump’s decision to ban transgender individuals from the military.¹¹⁶ There were numerous testimonies before Congress, by military chiefs, who testified that they found no issue having a transgender servicemembers on morale or unit cohesion.¹¹⁷ In fact, many of them have received honorable medals since the armed forces welcomed them in 2016.¹¹⁸

The saddening truth was, in 2019, about 14,700 military service members who identify as transgender were told that a core piece of them was not acceptable.¹¹⁹ The only way transgender individuals could serve in the military during that time was if they identify as their biological sex and have not nor plan to take any steps to correct their gender dysphoria.¹²⁰ Trump’s policy perpetuated harmful stereotypes that have harmful consequences on the transgender community, as it reaffirmed the social construct that transgender individuals have a mental illness.¹²¹ The Trump administration ban of transgenders in the military and rollback of Section 1557 of the ACA increased the disparity between transgenders and their cis counterparts. Not only was the United States government failing to provide the transgender community a safe avenue to access health care services under Section 1557, but seeking gender transition care as

¹¹² Goodwin & Chemerinsky, *supra* note 31, at 754.

¹¹³ *Id.* at 753.

¹¹⁴ Barbara L. McAneny, *AMA Statement on Pentagon’s Ban on Transgender in Military*, AMA (Apr. 11, 2019), <https://www.ama-assn.org/press-center/ama-statements/ama-statement-pentagons-ban-transgender-military>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Watson & McDermott, *supra* note 105.

¹¹⁹ *Id.*

¹²⁰ *5 Things to Know About DOD’s New Policy on Military Service by Transgender Persons and Persons With Gender Dysphoria*, *supra* note 91.

¹²¹ Goodwin & Chemerinsky, *supra* note 31, at 757.

well, could have cost them their right to serve in the United States military.¹²² This administration clearly demonstrated their belief that transgender individuals deserve fewer rights than others.¹²³

a. Don't Ask Don't Tell: The Unconstitutional Ban on Homosexual People in the Military

Unfortunately, discrimination in the United States military has been visibly consistent for decades.¹²⁴ Moreover, the military uses the same rationale, “readiness” and “lethality”, to discriminate against and ban different minority classes, such as African Americans, women, and homosexuals from serving in the military.¹²⁵ Claiming that the inclusion of X group would result in “inefficiency” and “weakening preparedness of the military”.¹²⁶ In the 1940s, the military relied on mental health proxies in the practice of purging gay men from serving in the military, the same tactic used to purge transgender service members from the military.¹²⁷ The military justified the 1940s ban of lesbians, gays, and bisexuals (“LGB”) from the military by concluding homosexuality was a mental disability and it would undermine the military’s “readiness” and “lethality”.¹²⁸

Then in 1994, the Clinton administration implemented a policy targeting LGB service members, similar to the animus-based discrimination transgender individuals service members were facing.¹²⁹ The policy was known as “Don’t Ask Don’t Tell (“DADT”).¹³⁰ Under DADT, the policy prevented openly homosexual individuals from enlisting and serving in the military “based on the unsupported claim that these *out* homosexuals ‘would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability’”.¹³¹ LGB service members were prohibited from speaking about anything that would convey their true sexual status and if they did choose to speak out

¹²² Victoria Manuel, *Trump's Transgender Military Ban: Policy, Law, and Litigation*, 29 TUL. J.L. & SEXUALITY 75, 79 (2020).

¹²³ *Id.*

¹²⁴ Goodwin & Chemerinsky, *supra* note 31, at 760.

¹²⁵ *Id.* at 771.

¹²⁶ *Id.*

¹²⁷ *Id.* at 776.

¹²⁸ *Id.*

¹²⁹ *Id.* at 769.

¹³⁰ *Id.*

¹³¹ *Id.*

about it, they would be prosecuted and discharged.¹³² The military’s justifications for banning transgender individuals and LGB individuals, forcing them to hide their true selves, are grounded in the same stereotype and stigmas.¹³³

In 2010, under the Obama administration, Congress found that DADT was unconstitutional on the grounds that it violated Due Process rights guaranteed under the Fifth Amendment, as well as freedom of speech under the First Amendment.¹³⁴ Furthermore, a report by the Palm Center of the University of California, Santa Barbara, in 2012, found that the repeal of DADT “has had no overall negative impact on military readiness...” and “survey data show[ed] that service members reported the same level of military readiness after [the] ... repeal as before it.”¹³⁵ The justifications for banning transgender individuals from military service were merely grounded in harmful stereotypes and stigmas.¹³⁶ Similarly, it is imperative to find the ban on transgender individuals serving in the military unconstitutional for the same reasons they found DADT to be unconstitutional for years to come.

b. A Bright Future

On March 31, 2021, the transgender community gained an illuminating step on their path towards gender equity because the Pentagon, now under the Biden administration, announced new policies that will repeal Trump’s transgender military ban.¹³⁷ The new policy allows individuals to freely serve in the military as the gender they identify as.¹³⁸ Furthermore, it “provide[s] a path for those in service for medical treatment, gender transition, and recognition in one’s self-identified gender.”¹³⁹ The new policies now ensures, to wit:

¹³² Schroth et al., *supra* note 33, at 125.

¹³³ *Id.*

¹³⁴ Ashley L. Behre, *Coming Out to Fight for Our Country: Achieving Equality for Gay Service Members in A Post-"Don't Ask, Don't Tell" Military*, 29 HOFSTRA LAB. & EMP. L.J. 189, 205 (2011).

¹³⁵ Manuel, *supra* note 122, at 78-79.

¹³⁶ Goodwin & Chemerinsky, *supra* note 31, at 770.

¹³⁷ Laurel Wamsley, *Pentagon Releases New Policies Enabling Transgender People to Serve in the Military*, NPR (Mar. 31, 2021), <https://www.npr.org/2021/03/31/983118029/pentagon-releases-new-policies-enabling-transgender-people-to-serve-in-the-milit>.

¹³⁸ *Id.*

¹³⁹ *Id.*

the military will provide a process by which an individual may transition gender while serving; a service member may not be involuntarily discharged or denied reenlistment solely on the basis of gender identity; and the Defense Health Agency has to develop clinical practice guidelines to support the medical treatment of service members diagnosed with gender dysphoria.¹⁴⁰

This policy change is momentous. “Military personnel reach maximum effectiveness when they have access to all medically necessary care.”¹⁴¹ This is why transgender service members like others in the military, deserve the complete medical care that they need, simple as that.

This policy change is significant because it eradicates the notion that transgender individuals deserve fewer protections than their cis counterparts.¹⁴² Transgender individuals deserve every right to be treated equally.¹⁴³ In addition, transgender individuals deserve access to nondiscriminatory health care services.¹⁴⁴ With this change in policy, there is vast hope the Biden administration will take steps toward breaking down those barriers that inhibit transgender individuals from receiving quality medical care.¹⁴⁵ In order to effect change, the Biden administration and the federal agencies beneath him will have to make a conscious effort of enforcing civil rights protections for everyone rather than privileging those with anti-transgender religious views.¹⁴⁶ It is essential that entities, like the Human Health Service’s Conscience and Religious Freedom Division, be disbanded and that all regulations weakening nondiscrimination protections in favor of another group, such as Section 1557 of the ACA,

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Dawn Ennis, *Biden Ends Ban on Transgender Military*, FORBES (Jan. 25, 2021), <https://www.forbes.com/sites/dawnstaceyennis/2021/01/25/biden-ends-ban-on-transgender-military/?sh=4243f3e24d9a>.

¹⁴³ *Id.*

¹⁴⁴ Kevin Jennings, *After Trump Sabotage, 3 Things Biden Must do to Restore Gay, Lesbian and Trans Rights*, USA TODAY (Mar. 5, 2021), <https://www.usatoday.com/story/opinion/2021/03/05/biden-restore-gay-lesbian-transgender-rights-trump-sabotage-column/6921195002/>.

¹⁴⁵ *Id.*

¹⁴⁶ Emily Hecht-McGowan, *Reversing the Damage Done to Lgbtq+ Rights and Equality*, 46 HUM. RTS. 8, 9 (2021).

be rescinded.¹⁴⁷ Moreover, it is imperative that President Biden reinstate Obama-Biden era executive actions, such as the ACA Section 1557, which was repealed by the Trump administration.¹⁴⁸ There is an immense possibility that President Biden will be able to amend Section 1557 to, once again, define sex as one's gender identity.¹⁴⁹ There is hope because as Commander-in-Chief, Biden within his first 100 days of presidency has taken several critical actions to reverse Trump's damage to transgender rights, such as directing the Department of Defense to lift Trump's transgender military ban.¹⁵⁰

V. MOVING FORWARD

a. Transgender Individuals Still Have Rights

While the Trump administration enacted a rule that misinterprets explicit protections for transgender individuals in health care, transgender individuals are still protected under Section 1557 of the ACA.¹⁵¹ A transgender individual who is discriminated against or denied health care still has the right to sue.¹⁵² The law still clearly states that sex discrimination in a health care setting is unlawful.¹⁵³ Only Congress has the power to change the law by repealing the ACA.¹⁵⁴ The fight is not over. Organizations, like the American Civil Liberties Union ("ACLU") and Lambda Legal, will continue to defend the rights of transgender individuals against inequality and injustice.¹⁵⁵ Moreover, there is a new hope that with President Biden and a Democratic majority in the Senate they will correct the wrongs to transgender individuals.¹⁵⁶ The Biden administration can close the gender inequality gap by setting a new precedent and enacting explicit discrimination protections for transgender individuals into our federal

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Apr. 2020), <https://transequality.org/HCRL-FAQ>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Florczak, *supra* note 1, at 467.

¹⁵⁶ Jennings, *supra* note 144.

civil rights laws.¹⁵⁷ Most imperative, if the United States wants to right the wrongs of the Trump administration, the ACA would have to be amended again to extended civil rights protections, such as nondiscrimination based on sex, which would include gender identity.¹⁵⁸

b. Necessary Structural Changes Within Medical Education to Effect Change

To reduce stigma and improve transgender individuals' access to optimal health care, all health care facilities and professionals need to become accustomed to medical research relating to transgender illnesses and transgender health care.¹⁵⁹ According to the University of Michigan Medical School, health care providers can provide quality care for transgender patients if four simple changes were implemented: "(1) updating the physical environment of the facility; (2) adding or changing intake and health history form questions; (3) improving provider-patient interviews; and (4) increasing the staff's knowledge about and sensitivity to LGBT patients."¹⁶⁰ Understanding the "lived experience of the transgender patient" is the only way health care providers can be sufficiently prepared to deliver competent and compassionate care for the transgender community.¹⁶¹ Furthermore, "it is up to the health care professional to be better informed about the [particular] health needs of the transgender community, just as they must be informed about any patient."¹⁶² This is imperative because it is not the patient's duty to educate their health care provider on their ailments and needs, let alone the needs of their community.¹⁶³

c. Necessary Structural Changes Within the Legal System

In order to prevent this adverse cycle of repealing the last president's policy, it is imperative that President Biden use the executive authority vested in him by Article II of the U.S.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Nikki Burrill & Valita Fredland, *The Forgotten Patient: A Health Provider's Guide to Providing Comprehensive Care for Transgender Patients*, 9 *IND. HEALTH L. REV.* 69, 98 (2012).

¹⁶⁰ *Id.* at 98-99.

¹⁶¹ *Id.* at 98.

¹⁶² *Id.* at 102.

¹⁶³ *Id.* at 104.

Constitution.¹⁶⁴ With that executive authority, he can root out discriminatory policies and deploy federal resources to protect transgender individuals from discrimination.¹⁶⁵ Biden administration can initiate this process by directing all federal agencies to implement the U.S. Supreme Court decision in *Bostock v. Clayton Cty.*¹⁶⁶ In *Bostock*, “the Supreme Court held that discrimination because of sexual orientation and gender identity is a form of sex discrimination covered under Title VII of the Civil Rights Act of 1964.”¹⁶⁷ Requiring all federal agencies to apply this law would be substantial for transgender rights.¹⁶⁸ This act will ensure consistent application and enforcement of *Bostock*’s definition of “sex” to all federal statutes prohibiting sex discrimination, such as the ACA.¹⁶⁹ Congress can ensure these comprehensive coverages and protections once and for all by passing Biden’s Equality Act.¹⁷⁰ The act will secure *Bostock* through legislative codification; adding sex discrimination protections to the federal public accommodations law; and clarifying that the RFRA does not exempt those who claim a religious right to discriminate against transgender individuals.¹⁷¹

VI. CONCLUSION

Considering the civil injustice the Trump administration has brought upon the transgender community; it is imperative to remember why the comprehensive health care reform law was first enacted back in 2010. To make affordable health care available to more people.¹⁷² The fight for gender equality will not stop until every individual is treated the same, regardless of the gender they identify as.

¹⁶⁴ Hecht-McGowan, *supra* note 147, at 8.

¹⁶⁵ *Id.*

¹⁶⁶ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

¹⁶⁷ Hecht-McGowan, *supra* note 146, at 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Statement by President Joseph R. Biden, Jr, on the Introduction of the Equality Act in Congress*, THE WHITE HOUSE (Feb. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph-r-biden-jr-on-the-introduction-of-the-equality-act-in-congress/>.

¹⁷¹ *Id.*

¹⁷² *HHS Finalizes Rule on Section 1557*, *supra* note 4.