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# Make America Discriminate Again? Why Hobby Lobby's Expansion of RFRA is Bad Medicine for Transgender Health Care

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# MAKE AMERICA DISCRIMINATE AGAIN? WHY HOBBY LOBBY'S EXPANSION OF RFRA IS BAD MEDICINE FOR TRANSGENDER HEALTH CARE

*Alexis M. Florczak*<sup>†</sup>

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<sup>†</sup> J.D. Candidate 2018, Case Western Reserve University School of Law. I would like to thank the following for making this Note possible: Professor Sharona Hoffman, whose keen insight, guidance, and support challenged me to produce a note that I am extremely proud of and hold dear to my heart; the past and present members of Health Matrix for selecting my note for publication and providing me with an incredible and fun two years full of countless memories; the current state of politics for keeping me on my toes in keeping this note as current as possible; and my family and friends for their encouragement, support, and willingness to listen and offer invaluable feedback.

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## I. INTRODUCTION

While the United States has been considered a nation for all since its founding, the idea of who this nation has recognized as having a right to life, liberty, and the pursuit of happiness has changed and expanded considerably. As the United States has diversified and recognized additional rights and protections for its citizens, the question of whose rights prevail when they are in conflict with another's rights has arisen. Today, this conflict is more polarizing than ever; the recently expanded rights<sup>1</sup> of the lesbian, gay, bisexual, and transgender ("LGBT")<sup>2</sup> community often conflict with individuals and companies who assert their constitutionally protected right to religious freedom.<sup>3</sup>

Health care has been no exception to the tension between these parties' equally legitimate, yet at times conflicting, spheres of rights. LGBT individuals continue to experience discrimination when seeking health care,<sup>4</sup> in part due to the medical profession's own stigmatization of this community. The American Psychiatric Association ("APA") considered homosexuality a mental disorder until 1973.<sup>5</sup> Transgender individuals—defined as those whose gender identity, expression, or behavior does not conform to the individual's sex assigned at birth<sup>6</sup>—

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1. See Office of the Press Sec'y, WHITEHOUSE.GOV, *Press Release on Fact Sheet: Obama Administration's Record and the LGBT Community* (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community>.
  2. Southern Law Poverty Center, *A Gender Spectrum Glossary*, PROJECT TOLERANCE, <http://www.tolerance.org/LGBT-best-practices-terms> (last visited Mar. 27, 2018) (noting that other versions of this acronym may also include 'Q' to stand for queer or questioning, 'I' to include intersex individuals, and 'A' for allies. For purposes of this Note, the acronym 'LGBT' will be used for the sake of consistency).
  3. See U.S. CONST. amend. I.
  4. See Kevin L. Ard & Harvey J Makadon, *Improving the Health Care of Lesbian, Gay, Bisexual and Transgender (LGBT) People: Understanding and Eliminating Health Disparities*, THE FENWAY INST. at 3, available at: <http://www.lgbthealtheducation.org/wp-content/uploads/Improving-the-Health-of-LGBT-People.pdf> (last reviewed Mar. 27, 2018).
  5. *Id.*
  6. *Id.*; See *Transgender People, Gender Identity and Gender Expression: What Does Transgender Mean?*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/topics/lgbt/transgender.aspx> (last reviewed Mar. 27, 2018).

were stigmatized by the medical community even longer. Until 2013<sup>7</sup>, the APA used the diagnosis of ‘gender identity disorder,’ suggesting that there was something inherently wrong with individuals who did not conform to their biological sex assigned at birth<sup>8</sup>. Globally, this stigmatization is even worse, as the World Health Organization (“WHO”) still includes identifying as transgender in its list of mental health conditions and behavior disorders.<sup>9</sup> WHO is striving to change this by 2018 in order to reduce the barriers to health care that transgender individuals too often face.<sup>10</sup> While the stigma has been removed on paper, progress still has to be made within the medical community to further eliminate discrimination and consequential health disparities that the transgender community endures.<sup>11</sup>

The Affordable Care Act (“ACA”) provides valuable protections to transgender individuals in health care. The ACA’s Nondiscrimination or Civil Rights provision (“Section 1557”),<sup>12</sup> provides that individuals are not to be subjected to discrimination or denied benefits or treatment by health care providers or institutions that receive financial assistance from the federal government.<sup>13</sup> The Department of Health and Human Services (“HHS”) provided further guidance on the ACA’s nondiscrimination provision, promulgating a final rule that makes it clear that sex-based discrimination includes discrimination on the basis of gender identity and sex stereotyping.<sup>14</sup> HHS’s final rule also provides that health care providers must treat patients in accordance with their own gender identity.<sup>15</sup> Section 1557 has been hailed as a victory for the

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7. Zack Ford, *APA Revises Manual: Being Transgender is No Longer a Mental Disorder*, THINKPROGRESS (Dec. 3, 2012), <https://thinkprogress.org/apa-revises-manual-being-transgender-is-no-longer-a-mental-disorder-8b0321f775d2#.16zsd9qlg>.
  8. *Id.*
  9. Pam Belluck, *W.H.O. Weighs Dropping Transgender Identity from List of Mental Disorders*, N.Y. TIMES (July 26, 2016), [https://www.nytimes.com/2016/07/27/health/who-transgender-medical-disorder.html?\\_r=0](https://www.nytimes.com/2016/07/27/health/who-transgender-medical-disorder.html?_r=0).
  10. *Id.*
  11. See Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.
  12. 42 U.S.C. § 18116 (2010).
  13. 42 U.S.C. § 18116(a) (2010).
  14. *Summary: Final Rule Implementing Section 1557 of the Affordable Care Act*, HHS.GOV (June 7, 2016), <http://www.hhs.gov/sites/default/files/2016-06-07-section-1557-final-rule-summary-508.pdf>.
  15. *Id.*

transgender community,<sup>16</sup> because it forbids insurance companies from denying transition-related services to transgender individuals, which can include therapy, prescription drugs, and related surgeries and procedures.<sup>17</sup>

However, the corrective measures of Section 1557 are at odds with advocates of religious freedom, who contend that providing some of these services to transgender patients conflicts with their religious beliefs.<sup>18</sup> While Section 1557 adopts the same religious exemptions available in other federal nondiscrimination laws,<sup>19</sup> advocates of religious freedom assert that these existing exemptions are not enough, and have challenged the validity of Section 1557 in court. Supporters of Section 1557 fear an even greater expansion of religious freedom rights in the wake of the Supreme Court's 2014 *Burwell v. Hobby Lobby Stores, Inc.* decision, which held that closely-held, for-profit corporations could be exempt from the ACA's contraceptive mandate because of their sincerely held religious beliefs.<sup>20</sup> While the Court's majority stressed the narrowness of its holding, many scholars fear that *Hobby Lobby's* impact will be far greater than anticipated,<sup>21</sup> particularly with respect to LGBT individuals.<sup>22</sup> The *Hobby Lobby* holding has already been used to justify discrimination against the LGBT

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16. See Stephen Peters, *HHS Implements Critical New Regulation to Protect LGBT People from Discrimination in Healthcare*, HUM. RTS. CAMPAIGN (May 13, 2016), <http://www.hrc.org/blog/hhs-implements-critical-new-regulation-to-protect-lgbt-people-from-discrimi>; *HHS Issues Regulations Banning Trans Health Care Discrimination*, NAT'L CTR. FOR TRANSGENDER EQUAL. (May 13, 2016), <https://www.transequality.org/blog/hhs-issues-regulations-banning-trans-health-care-discrimination>.
  17. Zack Ford, *Epic Week for Transgender Rights Expands with Health Care Protections*, THINKPROGRESS (May 13, 2016), <https://thinkprogress.org/epic-week-for-transgender-rights-expands-with-health-care-protections-e355d3d51db6#.silq8xjg>.
  18. See Chris Johnson, *New Lawsuit Seeks to Overturn Pro-Trans Rule in Obamacare*, WASH. BLADE (Aug. 23, 2016), <http://www.washingtonblade.com/2016/08/23/new-lawsuit-seeks-overtturn-pro-trans-rule-obamacare/>.
  19. *Summary of Final Rule*, *supra* note 14.
  20. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
  21. See Jeffrey Tobin, *On Hobby Lobby, Ginsburg was Right*, NEW YORKER (Sept. 30, 2014), <http://www.newyorker.com/news/daily-comment/hobby-lobbys-troubling-aftermath>; See also Tom Cohen, *Hobby Lobby Ruling Much More than Abortion*, CNN POLITICS (July 2, 2014), <http://www.cnn.com/2014/07/02/politics/scotus-hobby-lobby-impacts/>.
  22. See Travis Gasper, *A Religious Right to Discriminate: Hobby Lobby and "Religious Freedom" as a Threat to the LGBT Community*, 3 TEX A&M. L. REV. 395 (2015); Algae Eufrazio, *Venturing into a Minefield: Potential Effects of the Hobby Lobby Decision on the LGBT Community*, 18 SCHOLAR 107, 110 (2016).

community; in December 2016, a federal district judge blocked Section 1557 from implementation on the grounds that the rule violates doctors' and insurance companies' rights to religious freedom.<sup>23</sup> The time is now to revisit *Hobby Lobby's* actual implications and limitations before perilous consequences affect the transgender community.

Part II of this Note will provide an overview of health care discrimination and the health disparities experienced by transgender individuals. The disparities endured by this marginalized community are, in part, a result of discrimination by the medical profession itself. Part II will also look at other factors that contribute to these disparities, such as the lack of knowledge providers have in treating transgender patients and exclusionary practices of insurance companies. Finally, this section will discuss the changes the medical profession is making in response to the increased visibility of the transgender community, and the need for practitioners to be competent in providing care to this population.

Part III of this Note will discuss Section 1557 of the ACA and how this provision has built upon the foundation of other federal nondiscrimination laws. Part III will also discuss the final rule promulgated by HHS, which clarified Section 1557's scope and application to protecting the transgender community in health care.

Part IV will provide a brief overview of religious liberty protections at the federal level. Specifically, Part IV will discuss the Religious Freedom Restoration Act ("RFRA") and the history that led to its passage. Additionally, it will discuss the Supreme Court's 2014 *Burwell v. Hobby Lobby* decision and RFRA's expansion. Because the Court provided little guidance to lower courts for evaluating a corporation's sincerely held religious beliefs, the possibility for a corporation to succeed in asserting insincere beliefs to discriminate and deny medically necessary services to transgender individuals is a dangerous consequence inconsistent with RFRA's original purpose.

Part V will analyze the differences between challenges to Section 1557 relating to transgender health care and the precedent established by *Hobby Lobby*. Specifically, I will argue that the reasons set forth in *Hobby Lobby* for allowing closely-held corporations to evade the contraceptive mandate do not apply to denying various health services to the transgender community. Transgender health care involves additional access and cost complications that access to contraceptives at no charge does not, which should affect how future cases are decided.

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23. Mark Joseph Stern, *Judge: Doctors Have "Religious Freedom" to Refuse to Treat Trans Patients, Women Who've Had Abortions*, SLATE (Jan. 3, 2017), [http://www.slate.com/blogs/outward/2017/01/03/doctors\\_may\\_refuse\\_to\\_treat\\_transgender\\_patients\\_and\\_women\\_who\\_ve\\_had\\_abortions.html](http://www.slate.com/blogs/outward/2017/01/03/doctors_may_refuse_to_treat_transgender_patients_and_women_who_ve_had_abortions.html).

Part VI will analyze the current tumultuous state of politics and policy in the United States, specifically regarding the future of health care. This section will also discuss future Supreme Court decisions<sup>24</sup> and the Trump Administration's policies towards the LGBT community and advocates of religious freedom. Finally, Part VII of this Note will highlight recommendations regarding how to best reconcile religious freedom with the transgender community's need access to medically necessary services.

## II. DISCRIMINATION AND DISPARITIES FACED BY THE TRANSGENDER COMMUNITY IN UNITED STATES HEALTH CARE.

Transgender and gender-nonconforming individuals have endured a long history of discrimination in health care, causing a number of health disparities to arise. Additionally, the medical profession has historically implemented practices hostile to the transgender community, which has often discouraged this population from seeking necessary health services. This Part explores the factors and resulting disparities that have contributed to the current state of transgender health.

### *A. Health Disparities in the United States Transgender Population*

In 2016, The National Center for Transgender Equality released a nation-wide survey that it conducted in 2015.<sup>25</sup> The results of this survey are troubling, as health disparities prevalent in the transgender community span both physical and mental aspects of health and well-being.<sup>26</sup> Transgender individuals are almost eight times more likely to experience psychological distress than the general United States population.<sup>27</sup> Perhaps even more troubling is the higher-than-average rate of suicide attempts or suicidal thoughts in this population.<sup>28</sup> Forty percent of survey respondents reported attempting suicide, while 4.6 percent of the total U.S. population had done so.<sup>29</sup> Almost fifty percent of respondents reported experiencing serious thoughts about committing suicide in the past year—a rate over ten times higher compared to the general U.S. population.<sup>30</sup> Transgender individuals are

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24. Ariane de Vogue, *President Trump Nominates Neil Gorsuch for Supreme Court*, CNN POLITICS (Feb. 1, 2017), <http://www.cnn.com/2017/01/31/politics/donald-trump-supreme-court-nominee/>.

25. James et al., *supra* note 11, at 4.

26. *Id.*

27. James et al., *supra* note 11, at 101.

28. *See id.* at 112.

29. *Id.*

30. *Id.*

also nearly three times more likely to use illegal drugs and are more likely to be diagnosed with HIV.<sup>31</sup> While these figures may be startling, note that marginalized communities that face discrimination are more prone to suffer from physical and mental health conditions.<sup>32</sup> Particularly for the transgender community, discrimination in health care has caused many to delay visiting their health care providers for necessary services, causing conditions to worsen and helping contribute to these recorded disparities.<sup>33</sup>

The survey interviewed almost 28,000 transgender and gender nonconforming individuals.<sup>34</sup> Overall, as of 2014, 1.4 million adults in the United States identify as transgender, a figure that has doubled in the last decade.<sup>35</sup> Although the transgender community has gained visibility in the 21<sup>st</sup> century, it still remains underrepresented in the policy arena, as the 115<sup>th</sup> Congress, while containing allies and advocates of this community, has no transgender legislators.<sup>36</sup>

*B. The Medical Community's Treatment of Transgender Individuals*

While the transgender population experiences a number of health problems at higher rates than the general U.S. population,<sup>37</sup> one in three transgender individuals has had at least one negative experience when seeking out medical treatment.<sup>38</sup> Approximately one in four avoided seeking medical care altogether for fear of mistreatment because of their gender identity.<sup>39</sup>

One reason that transgender individuals experience mistreatment by their health care providers is in part because most current practitioners did not receive training in medical school for treating transgender patients.<sup>40</sup> Ironically, more information can at times be a

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31. *Id.* at 115, 120.

32. *Id.* at 103.

33. *Id.*

34. *Id.* at 4.

35. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, THE WILLIAMS INST. (June 2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

36. Jennifer Bendery, *2 Transgender Women Make History With Congressional Primary Wins*, HUFFINGTON POST (June 29, 2016), [http://www.huffingtonpost.com/entry/transgender-candidates-congress\\_us\\_5773dcf4e4b0352fed3e8695](http://www.huffingtonpost.com/entry/transgender-candidates-congress_us_5773dcf4e4b0352fed3e8695).

37. *See* discussion *infra* Part III.A.

38. *Id.* at 96.

39. *Id.* at 98.

40. *See* Juno Obedin-Maliver et al., *Lesbian, Gay, Bisexual, and Transgender-Related Content in Undergraduate Medical Education*, 306 J. AM. MED.



double-edged sword. Physicians and other health professionals are able to provide better care to patients when they have as much information about these patients as possible.<sup>41</sup> However, research demonstrates that while a health provider's knowledge about a patient's transgender status can facilitate more effective care, awareness of a patient's gender identity often leads providers to discriminate against him or her.<sup>42</sup> Examples of such discrimination and mistreatment include asking transgender patients invasive questions unrelated to their medical care, refusing to provide them with health-care services related to gender transitioning, and using abusive language towards transgender persons.<sup>43</sup>

Transgender individuals also report that their providers have little knowledge about treating transgender patients and that they are often the ones to educate their treating clinician about appropriate care.<sup>44</sup> A majority of transgender patients who see their provider specifically for transition-related services report that these providers had adequate knowledge related to transgender health care and that they did not have to educate these providers about their care.<sup>45</sup> However, more than half of transgender individuals who see a general care physician for transition-related services expressed a lack of confidence in how much these providers knew about treating transgender patients.<sup>46</sup>

Providers have similarly expressed a lack of confidence in their ability to treat transgender patients.<sup>47</sup> For example, a recent endocrinology survey reported that although four out of five endocrinologists provided medical care to a transgender patient, four out of five of these providers

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ASS'N. 971, 976 (Sept. 7, 2011); Caroline Davidge-Pitts et al., *Transgender Health in Endocrinology: Current Status of Endocrinology Fellowship Programs and Practicing Clinicians*, J. CLINICAL ENDOCRINOLOGY & METABOLISM 1286, 1288 (Jan. 10, 2017); Cecile A Unger, *Care of the Transgender Patient: A Survey of the Gynecologists' Current Knowledge and Practice*, 24 J. WOMEN'S HEALTH 114, 115 (2015).

41. Jaime M. Grant et al., *National Transgender Discrimination Survey Report on Health and Health Care* at 6 (Oct. 2010), [http://www.theaskforce.org/static\\_html/downloads/resources\\_and\\_tools/ntds\\_report\\_on\\_health.pdf](http://www.theaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf).
42. *Id.*
43. James et al., *supra* note 11, at 96-7.
44. *Id.* at 97.
45. *Id.*
46. *Id.* at 97-8.
47. Anna Almendrala, *Doctors Want to Learn More About Treating Transgender Patients, Survey Shows*, HUFFINGTON POST (Jan. 11, 2017), [http://www.huffingtonpost.com/entry/promising-doctors-survey-reveal-positive-attitude-toward-transgender-patients\\_us\\_5876a220e4b05b7a465d9fa4?section=us\\_queer-voices&](http://www.huffingtonpost.com/entry/promising-doctors-survey-reveal-positive-attitude-toward-transgender-patients_us_5876a220e4b05b7a465d9fa4?section=us_queer-voices&).

also reported that they did not receive any training on treating transgender patients.<sup>48</sup> A majority of practicing clinicians also indicated in the survey that their practices had few transgender-friendly accommodations, such as gender neutral bathrooms or intake forms that allowed patients to express gender nonconformity.<sup>49</sup>

One potential solution is to include such training in educational settings.<sup>50</sup> Currently, very few medical schools and fellowship programs offer training specific to treating transgender individuals.<sup>51</sup> Specialized training is critical, as physicians who lack proper knowledge about transgender-specific medical care often think that treatment is solely psychological.<sup>52</sup> In practice, however, care often involves hormone therapy and other related treatments.<sup>53</sup> Providers also need to recognize that treating transgender patients goes beyond transition-related care and includes providing preventative and primary care as well.<sup>54</sup> Physicians and other primary care providers should acknowledge that many transgender patients have undergone negative experiences with past providers.<sup>55</sup> Because of this, providers should have an acute focus on fostering trust with transgender patients.<sup>56</sup> Signals such as gender-neutral bathrooms in medical offices or receptionists who ask for a patient's preferred pronouns can also effectively facilitate building trust between a provider and transgender patient.<sup>57</sup>

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48. Caroline Davidge-Pitts et al., *Transgender Health in Endocrinology: Current Status of Endocrinology Fellowship Programs and Practicing Clinicians*, J. CLINICAL ENDOCRINOLOGY & METABOLISM 1286, 1288 (2017).
49. *Id.*
50. Amal Cheema, *Doctors Must Educate Themselves on Transgender Healthcare*, HUFFINGTON POST (Mar. 29, 2016), [http://www.huffingtonpost.com/amal-cheema/doctors-must-educate-themselves-on-transgender-health-care\\_b\\_9558018.html](http://www.huffingtonpost.com/amal-cheema/doctors-must-educate-themselves-on-transgender-health-care_b_9558018.html).
51. *Transgender Medical Research and Provider Education Lacking*, BOSTON UNIV. SCH. OF MED. (Dec. 12, 2013), <http://www.bumc.bu.edu/busm/2013/12/12/transgender-medical-research-and-provider-education-lacking/> [hereinafter BOSTON UNIV. SCH. OF MED.]; *see also* Caroline Davidge-Pitts et al., *supra* note 48, at 1289 (discussing the “underrepresentation” of transgender medical training).
52. BOSTON UNIV. SCH. OF MED., *supra* note 51.
53. *Id.*
54. *See* Davidge-Pitts et al., *supra* note 48, at 1289.
55. *See* James et al., *supra* note 11; *See also* Almendrala, *supra* note 47.
56. *Caring for Transgender Patients, Body and Mind*, COLUMBIA UNIV. SCH. OF NURSING (last visited Jan. 23, 2017), <http://nursing.columbia.edu/caring-transgender-patients-body-and-mind>.
57. *Id.*; *See also* Davidge-Pitts et al., *supra* note 48, at 1289.

A number of medical schools throughout the United States have modified their curricula in order to teach their students about the healthcare needs of this population.<sup>58</sup> Case Western Reserve University School of Medicine, for example, teaches its students terminology associated with the transgender community, and the community's obstacles to accessing health care.<sup>59</sup> Additionally, Boston University's School of Medicine, began piloting a transgender medical component in its curriculum.<sup>60</sup> This pilot program shows promise, as students have reported that they feel more confident in their ability to treat transgender patients.<sup>61</sup> Vanderbilt University Medical Center has also implemented a program focusing on LGBT health to improve patient care and health outcomes.<sup>62</sup>

Lack of competency in treating the transgender population is no excuse for discrimination,<sup>63</sup> as many organizations are making information publicly available on their websites to medical providers.<sup>64</sup> For example, the National LGBT Health Education Center provides a learning module on its website to educate medical providers on the foundations of transgender healthcare.<sup>65</sup> In this web module, health professionals learn the basic terms related to transgender health, effective policies for providing primary care to transgender patients, and how to create a non-threatening environment for transgender patients in the medical setting.<sup>66</sup> Additionally, the Association of American Medical Colleges ("AAMC") now provides guidance to

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58. See Davidge-Pitts et al., *supra* note 48, at 1289 (describing Tulane University's educational seminars focused specifically on treating transgender patients).
59. Kim Krisberg, *New Curricula Help Students Understand Health Needs of LGBT Patients*, AAMC NEWS (Sept. 29, 2016), <https://news.aamc.org/diversity/article/bring-lgbt-patient-care-medical-schools/>.
60. BOSTON UNIV. SCH. OF MED., *supra* note 51.
61. *Id.*
62. See *Program for LGBTI Health*, VAND. UNIV. SCH. OF MED., <https://medschool.vanderbilt.edu/lgbti/> (Mar. 27, 2018); See also Cheema, *supra* note 50.
63. Almendrala, *supra* note 47.
64. See e.g., Madeline B. Deutsch, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Nonbinary People*, U.C., SAN FRANCISCO CTR. EXCELLENCE FOR TRANSGENDER HEALTH (June 17, 2016), <http://transhealth.ucsf.edu/protocols>; *Transgender Health*, NAT'L LGBT HEALTH EDUC. CTR., <http://www.lgbthealtheducation.org/topic/transgender-health/> (last visited Nov. 30, 2016).
65. *Transgender Health*, *supra* note 64.
66. *Id.*

medical schools and physicians about care for LGBT individuals.<sup>67</sup> The AAMC's publication identifies a number of competency areas that physicians should strive to master to provide quality and respectful care to the transgender population.<sup>68</sup> In fact, the AAMC hopes to enable clinicians to consider care for the LGBT community as no different from caring for the general population.<sup>69</sup>

*C. Discriminatory Practices by Insurance Companies*

Insurance companies have also implemented practices that adversely affect transgender individuals. Before the passage of the ACA, very little protections existed for transgender individuals regarding health insurance coverage, because insurance companies could specifically create exclusions for transgender care.<sup>70</sup> Even if an insurance company did not outright ban transition-related procedures, the practice of medical coding made it difficult for transgender individuals to receive primary and preventative services.<sup>71</sup> For example, if a transgender male<sup>72</sup> who had not undergone gender reassignment surgery were to have a gynecological exam performed, his insurance likely would not have covered this service. Traditionally, medical coding practices adopted by insurance companies only allowed coverage for these procedures for cisgender individuals, and failed to consider that a

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67. *AAMC Releases Health Care Guidelines for Patients That Are LGBT, Gender Nonconforming, Or Born With Differences Of Sex Development*, FENWAY FOCUS, (Nov. 24, 2014) [hereinafter *AAMC Guidelines*], <http://fenwayfocus.org/2014/11/aamc-releases-health-care-guidelines-for-patients-that-are-lgbt-gender-nonconforming-or-born-with-differences-of-sex-development/>.
68. *Id.*; See also Krisberg, *supra* note 59.
69. *AAMC Guidelines*, *supra* note 67.
70. Katie Keith, *15 States and DC Now Prohibit Transgender Insurance Exclusions*, GEOR. UNIV. HEALTH POL'Y INST. CTR. ON HEALTH INS. REFORMS BLOG (Mar. 30, 2016), <http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/>.
71. Alex Zielinski, *Can Doctors Keep Up with the Growing Demand for Trans Health Care?*, THINKPROGRESS (Oct. 15, 2015), <https://thinkprogress.org/can-doctors-keep-up-with-the-growing-demand-for-trans-health-care-a8e78ee980bb#.nwixr87wp>.
72. See *Glossary of Gender and Transgender Terms*, FENWAY HEALTH (Jan. 2010), [http://fenwayhealth.org/documents/the-fenway-institute/handouts/Handout\\_7-C\\_Glossary\\_of\\_Gender\\_and\\_Transgender\\_Terms\\_.pdf](http://fenwayhealth.org/documents/the-fenway-institute/handouts/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms_.pdf) (defining 'transman' as an individual assigned female at birth, but who identifies and presents as male. In contrast to individuals identifying as transgender, cisgender individuals are those whose gender identity and expression correspond to the sex they were assigned at birth and which originally appears on their birth certificate).

patient's gender identity and gender assigned at birth may differ.<sup>73</sup> Additionally, coverage denial could lead to a cumbersome appeals process, and some physicians are cautious about treating transgender patients for fear of not getting paid by the insurance company for services provided.<sup>74</sup>

Taken together, these practices only further discourage transgender patients from seeking health care. As M. Dru Levasseur, director of the Transgender Rights Project at Lambda Legal points out, “[w]hen transgender people have a negative experience, it can just turn them away from any preventative care, or seeking care at all.”<sup>75</sup> This mentality often leads transgender patients to only seek out emergency care, which can prove fatal.<sup>76</sup> Insurance companies, like other providers, need to recognize that transgender health care involves more than transition-related care.<sup>77</sup>

### III. SECTION 1557 OF THE AFFORDABLE CARE ACT: NONDISCRIMINATION IN HEALTH CARE

Of the many patient protections that the ACA provides to Americans, Section 1557 is the first of its kind to provide individuals a private right of action for discrimination specifically occurring in a health care setting.<sup>78</sup> Section 1557 draws from other federal civil rights statutes and prohibits discrimination in health care on the basis of race, color, national origin, sex, age, or disability.<sup>79</sup>

Specifically, the statute states that:

an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including 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.<sup>80</sup>

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73. *Id.*

74. *Id.*

75. Almendrala, *supra* note 47.

76. *Id.*

77. Zielinski, *supra* note 71.

78. 42 U.S.C. § 18116(a) (2010) (stating that the nondiscrimination provision applies to “any health program or activity”).

79. *See id.*

80. *Id.*

Additionally, Section 1557 grants authority to the HHS Secretary to issue rules and regulations that will aid in the statute's implementation.<sup>81</sup> In May 2016, HHS promulgated its final rule on Section 1557, which provided a number of clarifications relating to the nondiscrimination provision's scope.<sup>82</sup> Most notably, the final rule clarifies that discrimination occurring on the basis of sex includes discrimination on the basis of sex stereotyping and an individual's gender identity.<sup>83</sup> As a result of broadening the definition of sex discrimination under Section 1557, transgender, non-conforming, and intersex individuals receive robust protections under the law that were previously not extended to this community.<sup>84</sup> The statute and its final rule's recognition of gender identity discrimination as a form of sex discrimination builds on a previous guidance released by the Department of Education under the Obama Administration.<sup>85</sup> Under this guidance, Title IX recognized that transgender students could bring discrimination claims against their educational institutions for discrimination that occurred on the basis of sex.<sup>86</sup>

The Final Rule implemented by HHS also clarifies what kinds of discrimination in health care will trigger Section 1557's application. First and foremost, Section 1557 allows transgender individuals to bring claims against their health care providers for any disparate treatment they encounter.<sup>87</sup> Such overt discrimination can range from a health care provider refusing to treat a patient because of their transgender status to performing violent or superfluous physical examinations.<sup>88</sup> Additionally, insurance companies can no longer deny coverage based on someone's gender identity or care related to an individual's

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81. 42 U.S.C. § 18116(c) (2010).

82. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016) (to be codified at C.F.R. 45 pt. 92).

83. *Id.*

84. *Fact Sheet: Nondiscrimination Under Section 1557 of the Affordable Care Act*, TRANSGENDER LAW CTR. (May 13, 2016), <http://transgenderlawcenter.org/wp-content/uploads/2016/05/2016-05-13-ACA-1557-Fact-Sheet-final.pdf>.

85. U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

86. The Obama Administration noted that public schools across the country should allow transgender students to use bathroom facilities which corresponded to their gender identity. Thwarting this, the Administration argued, would allow transgender students to assert they had been discriminated against on the basis of sex. *Id.*

87. *Fact Sheet: Nondiscrimination Under Section 1557*, *supra* note 84.

88. *Id.*

transition.<sup>89</sup> Barring a neutral, medical reason, a medical service cannot be denied to a transgender individual if the same or similar service is provided and covered for non-transgender individuals who receive the service for conditions that are unrelated to transition-related care.<sup>90</sup> For example, an insurance company that covers hormone therapy related to menopause cannot deny the coverage of hormone therapy for a transgender female who uses hormone therapy for purposes of her transition.<sup>91</sup> While physicians and insurance companies can exercise legitimate medical judgment relating to the safety and needs of each individual patient, it is discriminatory under Section 1557 to apply a heightened “medically necessary” standard for transgender patients versus non-transgender patients.<sup>92</sup>

The final rule issued by HHS furthermore details the settings to which the ACA’s nondiscrimination provision applies.<sup>93</sup> The nondiscrimination provision’s language of “any health program or activity”<sup>94</sup> and “any part of which is receiving Federal financial assistance”<sup>95</sup> extends to hospitals, clinics, pharmacies, and other health care facilities that receive federal funds for any reason.<sup>96</sup> This means that if a health care facility receives Medicare or Medicaid payments from the federal government or funds from federal programs, it will be subject to Section 1557.<sup>97</sup>

The final rule also applies to most health insurance companies, including Medicare and Medicaid plans, in addition to private and employer-sponsored plans.<sup>98</sup> If a health insurance company, for example, participates in any of the ACA-established health insurance exchanges, its receipt of federal money in the form of premium subsidies qualifies the insurance company as a health program or activity receiving

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89. *Final HHS Regulations on Health Care Discrimination: Frequently Asked Questions*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/sites/default/files/HHS-1557-FAQ.pdf> (last updated Mar. 27, 2018).

90. *Id.*

91. *Id.*

92. *Id.*

93. *See* 81 Fed. Reg. at 31376.

94. 42 U.S.C. § 18116(a) (2010).

95. *Id.*

96. *Fact Sheet: Nondiscrimination Under Section 1557*, *supra* note 84.

97. *Id.*

98. *Id.*; *Final HHS Regulations on Health Care Discrimination*, *supra* note 89.

financial assistance from the federal government.<sup>99</sup> As a result, all health insurance plans from the insurance company must follow Section 1557, even if those plans are not offered on the state exchanges.<sup>100</sup>

Notably, Section 1557 does not explicitly contain a religious exemption.<sup>101</sup> While HHS sought comments when it published notice of its proposed rule regarding whether a blanket religious exemption should be included, HHS ultimately decided against including such a provision.<sup>102</sup> HHS's rationale for not including an express religious exemption was to prevent the denial or delay of health care to marginalized groups and to encourage these individuals to seek necessary health care services.<sup>103</sup> While Section 1557 does not create its own religious exemption, HHS addressed these concerns when it promulgated its final rule and stressed that existing state and federal conscience clause and religious freedom statutes would remain applicable to protect the beliefs of religious organizations.<sup>104</sup>

#### IV. THE CASE FOR RELIGIOUS LIBERTY: THE RELIGIOUS FREEDOM RESTORATION ACT AND *HOBBY LOBBY* DECISION

While Section 1557 of the ACA does not contain a new religious exemption for health care providers, the nondiscrimination provision does not displace existing protections under federal and state law.<sup>105</sup> One of the most prominent federal statutes protecting religious liberty is the Religious Freedom Restoration Act (“RFRA”) of 1993.<sup>106</sup> While the RFRA has been in effect for over two decades, it is only recently that its scope has been broadened beyond what its drafters contemplated.<sup>107</sup>

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99. *Fact Sheet: Nondiscrimination Under Section 1557*, *supra* note 84; *Final HHS Regulations on Health Care Discrimination*, *supra* note 89.

100. *Id.*

101. *See* 42 U.S.C. § 18116 (2010); *See also* *Final HHS Regulations on Health Care Discrimination*, *supra* note 89.

102. *See* *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31376 (May 18, 2016) (to be codified at C.F.R. 45 pt. 92).

103. *Id.* at 31380.

104. *Summary of Final Rule*, *supra* note 14.

105. *Id.*

106. 42 U.S.C. § 2000bb-1 (1993).

107. *See* 42 U.S.C. § 2000bb(a)-(b) (1993).



*A. The Religious Freedom Restoration Act of 1993*

Congress passed the RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*.<sup>108</sup> In *Smith*, two Native American employees of a drug rehabilitation facility were fired from their jobs for ingesting peyote during a religious ceremony.<sup>109</sup> The discharged employees filed suit after Oregon determined they were ineligible for employment benefits as a result of violating Oregon's controlled substance law.<sup>110</sup> The ex-employees contended that this state action violated their free exercise of religion under the First Amendment.<sup>111</sup> In its majority decision, the Supreme Court held that asserting religious beliefs does not allow individuals to escape compliance with state laws of general applicability—that is, laws that do not directly target or restrict the religious beliefs of individuals.<sup>112</sup> Because Oregon's controlled substance law was a neutral law that made no attempt to restrict the exercise of religious beliefs, the state had not impermissibly infringed on the discharged employees' exercise of religion.<sup>113</sup>

The RFRA received bipartisan, near unanimous support in Congress.<sup>114</sup> The RFRA directly addresses the *Smith* holding in the statute's findings, stating that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”<sup>115</sup> RFRA provides powerful protections to an individual's exercise of religion, and prohibits the federal government, even as applied to laws that make no mention of religion, from substantially burdening a person's religious beliefs.<sup>116</sup> The statute additionally restored a compelling interest test that was established in previous Supreme Court decisions.<sup>117</sup> For a federal law to prevail in a RFRA challenge, the government must make a showing that it has a

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108. See Peter Steinfeld, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html>; See also *Emp't Div., Dept. of Hum. Resources of Or. v. Smith*, 494 U.S. 872, 874 (1990).

109. *Smith*, 494 U.S. at 874 (1990).

110. *Id.*

111. *Id.*

112. *Id.* at 879.

113. *Id.* at 882.

114. See Scott Bomboy, *What is RFRA and Why Do We Care?*, CONST. DAILY (June 30, 2014), <http://blog.constitutioncenter.org/2014/06/what-is-rfra-and-why-do-we-care/>.

115. 42 U.S.C. § 2000bb(a)(2) (1993).

116. 42 U.S.C. § 2000bb-1(a) (1993).

117. 42 U.S.C. § 2000bb-1(a)-(b) (1993).

compelling government interest in promulgating the law and that it implemented the least restrictive or least burdensome means to further that interest.<sup>118</sup> RFRA has since been held unconstitutional as applied to state action, and currently only applies to federal laws of general applicability.<sup>119</sup>

*B. Hobby Lobby and its Expansion of the RFRA*

In 2014, the Supreme Court heard a challenge to the ACA's contraceptive mandate by two for-profit corporations, Hobby Lobby Stores, Inc. ("Hobby Lobby") and Conestoga Wood Specialties ("Conestoga").<sup>120</sup> These private corporations maintained that their owners' sincerely held religious beliefs directly conflicted with the ACA's mandate to provide insurance coverage for certain contraceptives, and the RFRA prevented HHS from imposing this contraceptive mandate on these for-profit corporations because of their religious beliefs.<sup>121</sup> Accordingly, Hobby Lobby and Conestoga sought exemptions from the contraceptive mandate.<sup>122</sup>

In a 5-4 decision, the Supreme Court found for Hobby Lobby and Conestoga, holding that the RFRA could be applied to closely-held, for-profit corporations.<sup>123</sup> Under the framework of RFRA, requiring Hobby Lobby to cover all devices and medications under the ACA's contraceptive mandate would impermissibly burden the company's exercise of religion.<sup>124</sup> In the majority's opinion, Justice Alito recognized that providing coverage for certain contraceptive methods would directly conflict with their owners' religious beliefs that life begins at conception when a fertilized egg is created.<sup>125</sup> According to that belief, the contraceptives Hobby Lobby and Conestoga objected to would destroy a fertilized embryo, thus destroying a life.<sup>126</sup> Alito also noted that if Hobby Lobby refused to comply with the mandate, the monetary penalties the company would have to pay would be severe and potentially cost the company as much as \$475 million each year.<sup>127</sup> Between providing morally objectionable contraceptive coverage and

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118. *Id.*

119. *See generally* City of Boerne v. Flores 521 U.S. 507, 534 (1997).

120. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2766 (2014).

121. *Id.* at 2765.

122. *Id.* at 2765-66.

123. *Id.* at 2785.

124. *Id.* at 2786.

125. *Id.* at 2778.

126. *See id.*

127. *Id.* at 2779.

paying nearly half a billion dollars if Hobby Lobby refused to adhere to the mandate, the Court's majority found that the contraceptive mandate substantially burdened Hobby Lobby's religious beliefs.<sup>128</sup>

The federal government argued that providing women cost-free access to birth control advanced a compelling government interest and that mandating employer-sponsored health plans cover these contraceptives constituted the least restrictive means to further that interest, but this failed to persuade the Court's majority.<sup>129</sup> While Alito assumed that the government's interest in ensuring that women have access to contraceptives without cost is compelling, he remained less convinced about the second prong.<sup>130</sup> Alito argued that HHS failed to show it could not expand access to cost-free contraceptives without infringing on Hobby Lobby's religious beliefs.<sup>131</sup> He also suggested that the federal government could simply assume the costs of providing the contraceptives at issue if an employer objected to such coverage due to their religious beliefs.<sup>132</sup> In fact, Alito argued, because the federal government accommodated nonprofit corporations that objected to covering contraceptives on religious grounds, the federal government could extend this accommodation to for-profit corporations.<sup>133</sup> Because nonprofit organizations had an existing accommodation if they objected to covering contraceptives because of its religious beliefs, Alito argued that for-profit corporations could

Justice Alito responded to the Court's dissent and their apprehensions that this holding would "lead to a flood of religious objections regarding a wide variety of medical procedures and drugs."<sup>134</sup> Alito maintained throughout his opinion that the *Hobby Lobby* holding was "very specific,"<sup>135</sup> and the Court's decision was only concerned with addressing the ACA's contraceptive mandate.<sup>136</sup> Coverage requirements related to immunizations, Justice Alito noted, may advance a more compelling government interest than the contraceptive mandate, such as preventing infectious disease transmission.<sup>137</sup> By using this example, Alito warned that the *Hobby Lobby* ruling should not be read to permit

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128. *Id.*

129. *Id.*

130. *Id.* at 2780-81.

131. *Id.* at 2780.

132. *Id.*

133. *See id.* at 2782.

134. *Id.* at 2783.

135. *Id.* at 2760.

136. *Id.* at 2782.

137. *Id.*

employers to avoid other coverage requirements because of their religious beliefs.<sup>138</sup> Alito further asserted that the majority's decision did not mandate an accommodation for all closely-held corporations because of their asserted sincerely held religious beliefs.<sup>139</sup> Additionally, Alito provided assurance that future cases should not permit closely-held corporations to assert religious beliefs as a shield to protect a corporation from liability for illegal discrimination.<sup>140</sup>

Justice Kennedy's concurring opinion attempted to reinforce the idea that the majority's opinion should be construed very narrowly.<sup>141</sup> Kennedy agreed with Alito that the federal government failed to employ the least restrictive means in increasing women's access to cost-free contraceptives.<sup>142</sup> Kennedy placed particular emphasis on the fact that the government already had a workable framework in place for nonprofit corporations who had religious objections to the mandate.<sup>143</sup> This framework, Kennedy emphasized, avoids excessive restrictions on the rights of employees to have access to cost-free contraceptives, as the cost of providing these medications simply shifts to the government.<sup>144</sup> Kennedy warned, however, that while this solution worked here, it may be harder and more expensive to accommodate religious beliefs in other claims.<sup>145</sup>

Justice Ginsburg penned a passionate dissent in response to the majority's expansion of the right of religious freedom, stating that "[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."<sup>146</sup> During the passage of the ACA, Justice Ginsburg pointed out that Congress rejected the addition of a conscience clause provision to the legislation.<sup>147</sup> This amendment would have explicitly permitted employers and insurance companies to deny coverage based on religious convictions.<sup>148</sup> The rejection of this amendment, Ginsburg asserted, demonstrates that Congress wanted health care decisions about contraception to remain solely with women.<sup>149</sup>

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138. *Id.*

139. *See id.*

140. *Id.*

141. *See id.* at 2785 (Kennedy, J., concurring).

142. *Id.* at 2786.

143. *See id.*

144. *Id.* at 2786-87.

145. *Id.* at 2787.

146. *Id.* at 2790 (Ginsburg, J., dissenting).

147. *Id.* at 2789.

148. *Id.*

149. *Id.* at 2789-90.

She additionally contended that the RFRA is more limited in scope than the majority believes it to be, and according to its purposes, was only intended to restore the compelling interest test for cases challenging generally applicable laws to religious beliefs.<sup>150</sup> The majority's interpretation of the RFRA, Ginsburg contended, expands the RFRA's impact beyond simply restoring the compelling interest test by impermissibly expanding the scope of cases that may be brought under the statute.<sup>151</sup>

Justice Ginsburg also worried about the effect the majority's holding would have in future cases. She warned that expanding RFRA to apply to for-profit corporations would have "untoward effects," and more for-profit companies would seek religious exemptions to avoid compliance with government regulations.<sup>152</sup> Ginsburg also criticized the majority's opinion for failing to provide guidance in order to evaluate future religious objections to legislative mandates.<sup>153</sup> Allowing for-profit companies to assert religious objections to government regulations, Ginsburg argued, would require the court to approve some claims and deny others.<sup>154</sup> Engaging in this practice, Ginsburg warned, will require the judiciary to judge the credibility of asserted religious beliefs which it has in the past avoided.<sup>155</sup> Depending on how subsequent cases would be decided, weighing the credibility of a closely-held corporation's beliefs could make it seem as though the Court is favoring some religions over others, the very situation the Establishment Clause of the First Amendment is designed to prevent.<sup>156</sup> Justice Ginsburg thus recommended limiting religious exemptions to only those organizations formed for religious purposes.<sup>157</sup>

#### V. KEY DIFFERENCES BETWEEN THE *HOBBY LOBBY* DECISION AND SECTION 1557 CLAIMS

Despite the fact that RFRA has and will continue to be asserted in challenging Section 1557 of the ACA just as the *Hobby Lobby* plaintiffs had done, extending *Hobby Lobby's* holding to Section 1557 challenges is unwarranted. Whether a transgender patient's challenge involves an insurer denying payment for hormone therapy or a health care

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150. *See id.* at 2791.

151. *See id.* at 2791-92.

152. *Id.* at 2797.

153. *See id.* at 2805.

154. *See id.*

155. *See id.*

156. *Id.*

157. *Id.* at 2805-06.

institution's refusal to perform a medically necessary procedure, Section 1557 claims demand an outcome different from *Hobby Lobby's* precedent for a variety of reasons. Differences in effect, access, and associated costs exist that should distinguish challenges to Section 1557 apart from the legal challenges to the ACA's contraceptive mandate.

*A. More than 'Precisely Zero' Transgender Individuals Will be Affected*

In *Hobby Lobby*, Justice Alito stressed at the outset of his opinion that the Court's decision would affect "precisely zero" women.<sup>158</sup> In crafting the contraceptive mandate, HHS created an accommodation for not-for-profit organizations to allow these companies to invoke objections to the mandate on religious grounds.<sup>159</sup> Once a not-for-profit company asserts an objection on religious grounds and the federal government approves this objection, the government would bear the cost of the contraceptives.<sup>160</sup> This cost-shifting mechanism ensured that female employees of not-for-profit organizations would still receive contraceptive coverage at no cost.<sup>161</sup> Alito argued that this accommodation could simply be modified to allow for-profit corporations to avoid bearing the costs of contraceptive devices to which they objected on religious grounds.<sup>162</sup> Justice Kennedy similarly cited this "existing, recognized, workable, and already-implemented framework" as a reason for ruling against the federal government.<sup>163</sup>

Unlike the contraceptive mandate, no cost-shifting framework of any kind was proposed under the ACA for transition-related coverage, nor does one currently exist. Moreover, numerous gaps exist in the federal government's own insurance programs regarding transition-related care. Medicare, for example, rejected a National Coverage Determination for gender reassignment surgeries, and instead requires local Medicare contractors to approve coverage for these surgeries on a case-by-case basis.<sup>164</sup> Without a National Coverage Determination in place for these services, guidelines for determining coverage of these services are determined by each locality, leading to inconsistent

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158. *See id.* at 2760 (majority opinion).

159. *See id.* at 2763.

160. *Id.*

161. *See id.*

162. *See id.* at 2759.

163. *Id.* at 2786 (Kennedy, J., concurring).

164. *See Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery*, CTR. FOR MEDICARE AND MEDICAID SERVICES (June 6, 2016), <https://www.cms.gov/medicare-coverage-database/details/nca-proposed-decision-memo.aspx?NCAId=282>.

standards for approving these procedures across the country.<sup>165</sup> In addition, eligibility requirements and specific coverage options under Medicaid programs vary from one state to another.<sup>166</sup> While Section 1557 of the ACA prohibits insurance companies from implementing blanket exclusions on transition-related care, only thirteen states and the District of Columbia currently provide coverage for transition-related services under their state Medicaid programs.<sup>167</sup>

Covering transition-related services additionally implicates a much wider scope of care than is implicated by the contraceptive mandate. The owners of Hobby Lobby and Conestoga only objected to their employer-sponsored health insurance covering four methods of contraception—two intrauterine devices and two forms of the ‘morning-after’ pill—while paying for other contraceptive methods that did not conflict with their religious beliefs.<sup>168</sup> Potential challenges to Section 1557, however, could potentially involve all aspects of transition-related care, including insurance coverage of hormones, psychological therapy for gender identity disorder, and the performance and insurance payment of gender affirming surgeries.

*B. Transition Related Care is Often More Difficult to Access*

Even if a cost-shifting mechanism were in place for the government to assume the cost of transition-related services, access to these services remains a much greater obstacle than access to contraceptives.

In addition to existing cost-shifting mechanisms that will cover the cost of contraceptives an employer may object to, various other family planning options exist, which cannot be said transition-related medications. Over-the-counter family planning options are available for purchase at retail pharmacies and grocery stores,<sup>169</sup> and emergency contraceptives like the morning after pill are available at pharmacies without a prescription or proof of identification.<sup>170</sup> Additionally, some states allow pharmacists to prescribe birth control pills to patients after

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165. *See National and Local Coverage Determinations*, AM. ASS'N OF CLINICAL ENDOCRINOLOGISTS (Aug. 2012), <https://www.aace.com/files/cms-nlcd-for-common-endocrine-procedures-2012.pdf>.

166. *See State Medicaid & CHIP Profiles*, MEDICAID, <https://www.medicaid.gov/medicaid/by-state/by-state.html> (last visited Mar. 18, 2017).

167. *Pennsylvania Medicaid Removes Trans Health Exclusions!*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 20, 2016), <http://www.transequality.org/blog/pennsylvania-medicaid-removes-trans-health-exclusions>.

168. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 (2014).

169. Annette McDermott, *What Birth Control Methods are Available Over the Counter?*, HEALTHLINE (Mar. 10, 2016), <http://www.healthline.com/health/birth-control/over-the-counter-birth-control>.

170. *Frequently Asked Questions*, PLAN B, <http://www.planbonestep.com/FAQ.aspx> (last visited Mar. 18, 2017).

completing additional training, further expanding access to contraceptives.<sup>171</sup> The same multitude of options does not exist for prescriptions related to an individual's transition, as the forms of hormone therapy often used in an individual's transition are only available by prescription.<sup>172</sup>

An additional access hurdle is the number of health care centers available to provide these services, further demonstrating that an inequality is present. For example, women have access to family planning services at over 650 Planned Parenthood locations<sup>173</sup> and thousands of other government-funded health clinics serving underserved communities in the United States.<sup>174</sup> In comparison, only a handful of health clinics specific to the health needs of the LGBT population currently exist.<sup>175</sup> While general health clinics across the country can meet the health needs of transgender individuals, having these clinics demonstrate greater sensitivity and inclusivity towards this population will encourage members of this community to seek out needed health services.<sup>176</sup> While health clinics like Planned Parenthood now offer transition-related services, this access gap is unlikely to be resolved in the near future.<sup>177</sup>

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171. Sally Rafie, *Colorado is Third State Allowing Pharmacists to Prescribe Birth Control*, PHARMACY TIMES (Feb. 27, 2017), <http://www.pharmacytimes.com/contributor/sally-rafie-pharmd/2017/02/colorado-is-third-state-allowing-pharmacists-to-prescribe-birth-control>.
172. See Madeline B. Deutsch, *Overview of Feminizing Hormone Therapy*, CTR. EXCELLENCE FOR TRANSGENDER HEALTH, <http://transhealth.ucsf.edu/trans?page=guidelines-feminizing-therapy> (last visited Mar. 18, 2017); Madeline B. Deutsch, *Overview of Masculinizing Hormone Therapy*, CTR. EXCELLENCE FOR TRANSGENDER HEALTH <http://transhealth.ucsf.edu/trans?page=guidelines-masculinizing-therapy> (last visited Mar. 18, 2017).
173. *Planned Parenthood at a Glance*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/about-us/who-we-are/planned-parenthood-at-a-glance> (last visited Mar. 18, 2017).
174. *Maps: Health Clinics Nationwide Compared to Planned Parenthood Centers*, CHARLOTTE LOZIER INS. (Aug. 21, 2015), <https://lozierinstitute.org/health-clinics-nationwide-compared-to-planned-parenthood-centers/>.
175. See *Health Services: Lesbian, Gay, Bisexual and Transgender Health Clinics*, CENTERS FOR DISEASE CONTROL (2014), <https://www.cdc.gov/lgbthealth/health-services.htm>.
176. See Wendy Stark, *LGBT Health Centers Receive Historic Recognition and Support*, HUFFINGTON POST (Aug. 21, 2016), [http://www.huffingtonpost.com/wendy-stark/lgbt-health-centers-recei\\_b\\_8012224.html](http://www.huffingtonpost.com/wendy-stark/lgbt-health-centers-recei_b_8012224.html).
177. See e.g., *Transgender Hormone Therapy and Preventative Health Services*, PLANNED PARENTHOOD OF ILL., <https://www.plannedparenthood.org/planned-parenthood-illinois/patient-resources/transgender-healthcare> (last visited Mar. 18, 2017); See also Evan Urquhart, *Planned Parenthood is Helping Transgender Patients Access Hormone Therapy*,



*C. The Costs of Transition-Related Care & Services are More  
Burdensome*

Another key difference that distinguishes transition-related services from contraceptives relates to the differences in cost to the patient. Emergency contraception such as the morning after pill costs an average of \$35-60 per dosage, and is not intended for regular use.<sup>178</sup> While the cost of an intrauterine device (IUD) is higher, potentially upwards of \$1,000 out of pocket, this price often includes the medical exam and follow-up visits in addition to the device and its insertion.<sup>179</sup> Further, the higher upfront cost of these devices should be considered in light of the length of time an IUD is effective for, which ranges from three to twelve years depending on the model that is used.<sup>180</sup>

Costs associated with transition-related medications and procedures are overwhelmingly higher than the cost of the contraceptives to which the plaintiffs in *Hobby Lobby* objected. The price of hormone therapy is about \$1,500 per year and is something many transgender patients may assume for the rest of their lives, though this may vary depending on the delivery method prescribed.<sup>181</sup> Moreover, while patients would only assume the cost of gender affirming surgeries once per procedure performed, these procedures often surpass \$100,000 without insurance.<sup>182</sup>

It bears repeating that, unlike the contraceptive mandate, no government program exists at this time to shift the cost of transition-related services to the government, a point repeated and used against the federal government's position in *Franciscan Alliance v. Burwell*.<sup>183</sup>

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SLATE (Jan. 29, 2016), [http://www.slate.com/blogs/outward/2016/01/29/how\\_planned\\_parenthood\\_helps\\_transgender\\_patients\\_get\\_hormone\\_therapy.html](http://www.slate.com/blogs/outward/2016/01/29/how_planned_parenthood_helps_transgender_patients_get_hormone_therapy.html).

178. *How to Get Emergency Contraception*, OFFICE OF POPULATION RESEARCH: PRINCETON UNIV., <http://ec.princeton.edu/questions/eccost.html> (last visited Mar. 18, 2017); *Safety*, OFFICE OF POPULATION RESEARCH: PRINCETON UNIV., <http://ec.princeton.edu/questions/crepeated.html> (last visited Mar. 18, 2017).

179. *How Can I Get an IUD?*, PLANNED PARENTHOOD (last visited Mar. 18, 2017), <https://www.plannedparenthood.org/learn/birth-control/iud/how-can-i-get-an-iud>.

180. *IUD*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/birth-control/iud> (last visited Mar. 18, 2017).

181. Elle Bradford, *You Won't Believe How Much It Costs to be Transgender in America*, TEEN VOGUE (Nov. 24, 2015), <http://www.teenvogue.com/story/transgender-operations-hormone-therapy-costs>.

182. Alyssa Jackson, *The High Cost of Being Transgender*, CNN (July 31, 2015), <http://www.cnn.com/2015/07/31/health/transgender-costs-irpt/>.

183. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).

While women could still gain access to cost-free contraceptives after the *Hobby Lobby* ruling, transgender individuals will be left without an alternative source of coverage.<sup>184</sup> This “let the government pay” alternative appears to have no limit, and, as Justice Ginsburg points out in her dissent, the *Hobby Lobby* majority fails to address at what point shifting costs of medical care to the federal government that is objected to on an employer’s religious grounds would be too extreme.<sup>185</sup>

## VI. THE GOOD, THE BAD, AND THE UNKNOWN: THE FUTURE OF NONDISCRIMINATION IN HEALTH CARE FOR TRANSGENDER AMERICANS

Just as the future of health care and its infrastructure hangs in the balance, so does the future of Section 1557 and its protections for transgender Americans. While recent actions among various branches of the federal government have reduced Section 1557’s efficacy in combatting gender identity discrimination in health care, this issue is by no means settled.

### *A. Current State of Section 1557*

Full implementation of Section 1557’s numerous patient protections has recently come to a standstill. In *Franciscan Alliance v. Burwell*, Texas, along with seven additional states and three private health care organizations challenged Section 1557’s recognition of gender identity discrimination as a subclass within sex discrimination claims in federal court.<sup>186</sup> These plaintiffs argued that their compliance with Section 1557’s requirements contradicted their medical judgment and religious beliefs, and conflicted with their rights under the RFRA.<sup>187</sup> Additionally, plaintiffs challenged Section 1557’s interpretation of sex discrimination to include gender identity discrimination.<sup>188</sup>

Judge O’Connor, the federal district court judge, sided with the plaintiffs and granted a partial, nation-wide injunction to prevent Section 1557 from going into full effect nation-wide.<sup>189</sup> Judge O’Connor

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184. See Kimberly Leonard, *After Hobby Lobby, a Way to Cover Birth Control*, U.S. NEWS AND WORLD REP. (July 10, 2015), <https://www.usnews.com/news/articles/2015/07/10/after-hobby-lobby-ruling-hhs-announces-birth-control-workaround>.

185. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 (2014).

186. See *Franciscan Alliance*, 227 F. Supp. 3d. at 670.

187. *Id.*

188. *Id.* at 671.

189. Camila Domonoske, *U.S. Judge Grants Nationwide Injunction Blocking White House Transgender Policy*, NPR (Aug. 22, 2016), <http://www.npr.org/sections/thetwo-way/2016/08/22/490915833/u-s-judge-grants-nationwide-injunction-blocking-white-house-transgender-policy>; Theodore

first found Section 1557's interpretation of sex discrimination as consistent with Title IX claims violated the Administrative Procedure Act.<sup>190</sup> In his opinion, O'Connor reasoned that Title IX's definition of sex strictly referred to biological sex and not an internal sense of gender identity, and that HHS lacked the authority to expand the definition of sex discrimination under Title IX.<sup>191</sup> O'Connor also found Section 1557 and its final rule to violate RFRA, as an individualized assessment of covering or performing transition-related services would substantially burden the plaintiffs' religious beliefs because it pressured them to provide transition-related services.<sup>192</sup>

Recent developments have only increased the uncertainty surrounding Section 1557's future. The federal district court for Texas's Northern District has issued a stay for the proceedings in *Franciscan Alliance v. Price* and in-part remanded the litigation to HHS in order for the Department to reconsider the nondiscrimination rule.<sup>193</sup> It is predicted that the HHS and Trump Administration's revised rule will eliminate previous protections to the transgender community, making it easier for providers to refuse treatment and healthcare services to this population.<sup>194</sup>

It should be noted that the plaintiffs in *Franciscan Alliance* were not closely held, for-profit organizations like Hobby Lobby and Conestoga. Franciscan Alliance, Inc., a Roman Catholic hospital system, provided health care consistent with its founding religion.<sup>195</sup> The Christian Medical and Dental Association ("CMDA") is a faith-based group of providers who pledge upon joining that they will practice

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Schleifer, *Federal Judge Halts Transgender Protections in Obamacare*, CNN (Jan. 2, 2017), <http://www.cnn.com/2017/01/02/politics/obama-care-transgender-protection/>.

190. See *Franciscan Alliance*, 227 F. Supp. 3d, at 687, 691.

191. *Id.* at 687-88.

192. *Id.* at 670, 691, 693.

193. Timothy Jost, *House, Administration Oppose State Intervention in House v. Price; New Developments in ACA Section 1557 Case*, HEALTH AFFAIRS BLOG (July 11, 2017), <http://healthaffairs.org/blog/2017/07/11/house-administration-oppose-state-intervention-in-house-v-price-new-developments-in-aca-section-1557-case/>; Haynes and Boone LLP, *Court Issues Stay on Proceedings in Challenge to ACA Section 1557 Nondiscrimination Regulations*, LEXOLOGY NEWSFEED (Aug. 3, 2017), <https://www.lexology.com/library/detail.aspx?g=555ab58c-57af-4559-adfd-70629e80b85d>.

194. Nathaniel Weixel, *Trump Expected to Roll Back LGBT Protections in Obamacare*, THE HILL (Aug. 12, 2017), <http://origin-ny1.thehill.com/policy/healthcare/346246-trump-expected-to-roll-back-lgbt-protections-in-obamacare>.

195. *Id.*

medicine consistent with their religious beliefs.<sup>196</sup> While these plaintiffs are affiliated with religious organizations and this may be a lower federal court ruling that can be appealed and overturned if a new case challenges Section 1557's requirements, *Franciscan Alliance, Inc. v. Burwell* is laying a foundation for for-profit health care corporations to bring similar challenges in the future. Given that *Hobby Lobby* remains good law today, it is not difficult to imagine courts finding in favor of a closely-held, for-profit corporation that established it was closely held by its owners bringing their own challenge to Section 1557. Justice Ginsburg's fears that the Court will be forced to allow some religious claims to be asserted against health care regulations and not others is seemingly imminent in light of this district court decision.<sup>197</sup>

*B. The Future of the ACA*

While the election of Donald J. Trump as the 45<sup>th</sup> President of the United States has led to increased uncertainty regarding the ACA's longevity, the ACA for the most part remains in American healthcare infrastructure—at least for the time being. Although the ACA's individual mandate was repealed in December 2017,<sup>198</sup> House and Senate Republicans have failed numerous times to pass various versions of repeal and replace legislation since Donald Trump took office.<sup>199</sup> While the ACA remains in place for now, President Trump and the executive branch can still weaken the ACA without passing legislation, and has threatened to withhold subsidies to insurance companies to weaken the health insurance marketplace.<sup>200</sup> It also remains possible

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196. *Id.*

197. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (Ginsburg, J., dissenting).

201. Sy Mukherjee, *The GOP Tax Bill Repeals Obamacare's Individual Mandate. Here's What that Means for You*, FORTUNE (Dec. 20, 2017), <http://fortune.com/2017/12/20/tax-bill-individual-mandate-obamacare/>.

199. *See, e.g.*, Robert Pear and Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html?mcubz=0>; Jeffrey Young, *Another Obamacare Repeal Bill Just Failed in the Senate*, HUFFINGTON POST (July 26, 2017), [http://www.huffingtonpost.com/entry/another-obamacare-repeal-bill-failed-senate\\_us\\_5978ac7ae4b0a8a40e846f99](http://www.huffingtonpost.com/entry/another-obamacare-repeal-bill-failed-senate_us_5978ac7ae4b0a8a40e846f99).

200. Gabrielle Levy, *Trump Escalates Threats Against Obamacare*, U.S. NEWS (July 31, 2017), <https://www.usnews.com/news/national-news/articles/2017-07-31/trump-escalates-threats-to-undermine-obamacare>; Rachana Pradhan, *How Trump's White House Can Still Undermine Obamacare*, POLITICO (July 28, 2017), <http://www.politico.com>

that efforts to repeal the healthcare law could be revived, or bipartisan efforts to improve the ACA could be introduced by Congress.<sup>201</sup>

Even though efforts to repeal and replace the ACA have failed to date, Republican replacement legislation has notably included Section 1557's provision prohibiting discrimination in health care on the basis of protected classes, including sex.<sup>202</sup> Even if future replacement efforts were to continue to include a nondiscrimination provision, actions by the Trump Administration have indicated these protections will not extend to the transgender community.

As previously discussed, HHS under the Obama Administration, following the Department of Education's interpretation, recognized gender identity discrimination as a form of sex discrimination.<sup>203</sup> In February 2017 the Trump Administration rescinded this Obama-era guidance, reasoning that decisions regarding the civil rights of transgender students is best left to state and local governments, and the federal government should not be involved in this debate.<sup>204</sup> Reversal of the Obama Administration's interpretation of what falls under sex discrimination means the transgender community faces even more of an uphill battle when mistreated not only in educational settings, but also in health care. Additionally, the Trump Administration's proposed ban on transgender individuals serving in the armed forces only further indicates the unlikelihood that the federal government will ensure this community will not be discriminated against in healthcare.<sup>205</sup>

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/story/2017/07/28/how-trump-white-house-can-undermine-obamacare-241092.

201. Robert King, *Bipartisan Healthcare Reform off to a Rocky Start in the Senate*, WASH. EXAMINER (July 30, 2017), <http://www.washingtonexaminer.com/bipartisan-healthcare-reform-off-to-a-rocky-start-in-the-senate/article/2630089>; Rachel Estabrook, *Governors Preparing Bipartisan Health Care Plan for Congress to Consider*, NPR (Aug. 22, 2017), <http://www.npr.org/2017/08/22/545307530/governors-preparing-bipartisan-health-care-plan-for-congress-to-consider>; Amy Goldstein, *Bipartisan Health Policy Coalition Urges Congress to Strengthen the ACA*, WASH. POST (Aug. 11, 2017), [https://www.washingtonpost.com/national/health-science/bipartisan-health-policy-coalition-urges-congress-to-support-the-aca/2017/08/09/59ab7ec8-7c80-11e7-a669-b400c5c7e1cc\\_story.html?utm\\_term=.e6d5b635f87d](https://www.washingtonpost.com/national/health-science/bipartisan-health-policy-coalition-urges-congress-to-support-the-aca/2017/08/09/59ab7ec8-7c80-11e7-a669-b400c5c7e1cc_story.html?utm_term=.e6d5b635f87d).
202. Timothy Jost, *Examining the House Republican ACA Repeal and Replace Legislation*, HEALTH AFFAIRS BLOG (Mar. 7, 2017), <http://healthaffairs.org/blog/2017/03/07/examining-the-house-republican-aca-repeal-and-replace-legislation/>.
203. See discussion *supra* Part III.
204. de Vogue et al., *supra* note 24.
205. Julie Hirschfeld Davis and Helene Cooper, *Trump Says Transgender Military People Will Not Be Allowed in Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-trans>

It remains to be seen how, and when, the Supreme Court will rule on the precise legal question of whether gender identity discrimination is a legitimate cause of action under Title IX and Section 1557 sex discrimination cases. After the Trump Administration rescinded the Obama Administration's Title IX interpretive guidance on gender identity discrimination,<sup>206</sup> the Supreme Court sent *G.G. v. Gloucester County School Board* back to the 4<sup>th</sup> Circuit Court of Appeals in order to reconsider its previous ruling in light of the policy change. Had the case not been vacated to the lower court, the Supreme Court could have ruled for the first time on the rights of transgender Americans.<sup>207</sup> Since this decision to reconsider, the 4<sup>th</sup> Circuit sent *G.G. v. Gloucester* back even further to the district court level to determine whether Grimm continued to have standing after graduating from high school.<sup>208</sup> However, other federal courts have since heard similar cases (and will likely continue to hear such cases) and ruled that transgender students can use school facilities, such as bathrooms and locker rooms, that are consistent with their gender identity, keeping the potential for Supreme Court review possible in the future.<sup>209</sup>

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ender-military.html?mcubz=0; Elliot Hannon, *Trump Administration is Reportedly About to Issue its Transgender Ban to the Pentagon*, SLATE (Aug. 23, 2017), [http://www.slate.com/blogs/the\\_slatest/2017/08/23/trump\\_administration\\_is\\_reportedly\\_about\\_to\\_issue\\_its\\_transgender\\_ban\\_to.html](http://www.slate.com/blogs/the_slatest/2017/08/23/trump_administration_is_reportedly_about_to_issue_its_transgender_ban_to.html).

206. *G.G. v. Gloucester County School Board*, ACLU (Mar. 6, 2017), <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>; Robert Barnes, *Supreme Court Sends Virginia Transgender Case Back to Lower Court*, WASH. POST (Mar. 6, 2017), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-sends-transgender-case-back-to-lower-court/2017/03/06/0fc98c62-027a-11e7-b9fa-ed727b644a0b\\_story.html?utm\\_term=.be3044a7de4d](https://www.washingtonpost.com/politics/courts_law/supreme-court-sends-transgender-case-back-to-lower-court/2017/03/06/0fc98c62-027a-11e7-b9fa-ed727b644a0b_story.html?utm_term=.be3044a7de4d).
207. Barnes, *supra* note 206.
208. Daniel Trotta, *Major U.S. Transgender Case Remanded After Student Graduates*, REUTERS (Aug. 2, 2017), <https://www.reuters.com/article/us-usa-court-transgender-idUSKBN1AI2MF>. The ACLU has filed an amended complaint on behalf of Grimm asking to permanently revise the school's discriminatory policy. See Joshua Block, *Gavin Grimm's Lawsuit Enters a New Phase*, ACLU (Aug. 11, 2017), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/gavin-grimms-lawsuit-enters-new-phase?redirect=blog/speak-freely/gavin-grimms-lawsuit-enters-new-phase>.
209. See Ann E. Marimow, *Federal Judge Sides with Transgender Teen in Challenge Over School Locker Rooms*, WASH. POST (Mar.13, 2018), [https://www.washingtonpost.com/local/public-safety/federal-judge-sides-with-transgender-teen-in-challenge-over-school-locker-rooms/2018/03/13/562a08a6-26de-11e8-bc72-077aa4dab9ef\\_story.html?utm\\_term=.9b47d2db7eb4](https://www.washingtonpost.com/local/public-safety/federal-judge-sides-with-transgender-teen-in-challenge-over-school-locker-rooms/2018/03/13/562a08a6-26de-11e8-bc72-077aa4dab9ef_story.html?utm_term=.9b47d2db7eb4); see also Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Edn., 858 F.3d 1034, 1050, 1054 (7th Cir. 2017)(ruling on both Title IX and Equal Protection Grounds).

*C. Potential for Increased Religious Freedom Protections*

While the forward progress of transgender rights may remain at a standstill for now, the same cannot be said for religious freedom. While Congress has made various attempts to increase federal protections of religious liberty, a Republican-controlled Legislative and Executive branch increases the likelihood of success in future attempts. Republican Senators have indicated their intention to reintroduce the First Amendment Defense Act (“FADA”), which if passed, would prevent the federal government from punishing individuals and businesses who discriminate against others based on their religious beliefs.<sup>210</sup> Opponents of this proposed legislation fear that were FADA enacted, the LGBT community would be subject to widespread discrimination and run the risk of violating principles of equal protection.<sup>211</sup> While this bill has yet to be introduced in the current Congress, President Trump has indicated that he would sign FADA into law if it were presented to him.<sup>212</sup>

The addition of Neil Gorsuch to the Supreme Court raises additional concerns regarding future cases that require the careful balancing of LGBT rights and religious liberty. Notably, Gorsuch wrote a concurring opinion in the Tenth Circuit’s *Hobby Lobby* decision before it went to the Supreme Court, an opinion Lambda Legal considers “disqualifying.”<sup>213</sup> Specifically, Gorsuch narrowed in on the notion of complicity, that as individuals, “we must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others.”<sup>214</sup> Gorsuch further stated that, so long as an individual’s religious beliefs are sincerely held, it makes no difference how attenuated the “impermissible degree of assistance” may be of the objectionable conduct at issue.<sup>215</sup> Alarming, Justice Gorsuch also

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210. Mary Emily O’Hara, *First Amendment Defense Act Would be ‘Devastating’ for LGBTQ Americans*, NBC NEWS (Dec. 21, 2016), <http://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416>.

211. *Id.*

212. *Id.*; See also Morgan Brinlee, *Trump Just Quietly Admitted He’s Going to Sign this Anti-LGBTQ Bill*, BUSTLE (Dec. 29, 2016), <https://www.bustle.com/p/donald-trump-just-quietly-admitted-hes-going-to-sign-this-anti-lgbtq-bill-26960>.

213. *Neil Gorsuch Has an Unacceptable, Hostile Record Towards LGBT People*, LAMBDA LEGAL (Jan. 31, 2017), [http://www.lambdalegal.org/blog/20170131\\_no-to-neil-gorsuch](http://www.lambdalegal.org/blog/20170131_no-to-neil-gorsuch).

214. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013).

215. *See id.*

characterized RFRA as a “super-statute” that gives Americans the ability to ignore the other legal obligations if the law intrudes on their religious freedom.<sup>216</sup> Gorsuch’s interpretation of RFRA is radical, considering that Justice Alito’s majority opinion in *Hobby Lobby* rejected this extreme view.<sup>217</sup>

It will not be long before the Supreme Court attempts to reconcile the tension between religious liberty and nondiscrimination protections for the LGBT community, as the Court recently heard oral arguments for *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*—a critical case that will require the Court to address these legitimate yet conflicting interests.<sup>218</sup> While the Court’s decision has yet to be released, it is likely to have a profound impact on future jurisprudence, policy, and the livelihood and dignity of individuals.

Additionally, the Trump Administration has prioritized protecting religious liberty and conscience-based objections. In January 2018, HHS announced the creation of the Conscience and Religious Freedom Division within the HHS Office for Civil Rights.<sup>219</sup> This new division aims to enforce federal laws that protect conscience- and religiously-based objections in providing certain health care services.<sup>220</sup>

HHS additionally released a proposed rule titled “Protecting Statutory Conscience Rights in Health Care.”<sup>221</sup> The proposed rule would provide the newly-created HHS division enhanced enforcement powers over established laws and regulations on conscience-based protections in healthcare, such as conducting outreach on behalf of

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216. *Id.* at 1156-57.

217. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (“Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs.”); Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, N.Y. TIMES (June 30, 2014), <https://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html>.

218. Oral arguments were presented before the court in December 2017. See Transcript of Oral Argument, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, (Dec. 5, 2017) (No. 16-111).

219. HHS Office for Civil Rights, *HHS Announces New Conscience and Religious Freedom Division*, HHS.GOV (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

220. Sarah Pulliam Bailey, *HHS is Targeting Health Workers’ Religious Objections. Here’s Why*, WASH. POST (Jan. 19, 2018), [https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/18/a-short-history-of-why-hhs-cares-about-doctors-religious-objections/?utm\\_term=.0e95339963f1](https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/18/a-short-history-of-why-hhs-cares-about-doctors-religious-objections/?utm_term=.0e95339963f1)

221. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880, 3880 (Jan. 26, 2018).



individuals who feel they were coerced or discriminated against in refusing to provide certain health care services.<sup>222</sup> The rule would also give HHS the ability to conduct investigations and compliance reviews of health care entities—even if HHS did not receive a complaint against the particular entity.<sup>223</sup> Health care entities would have additional obligations under this rule, including the obligation to post notices to patients and employees informing them of their right to object to being “morally complicit” in providing health care services that goes against their religious or moral beliefs, and maintaining records demonstrating the entity’s compliance with these laws.<sup>224</sup> The HHS rule is vast and far-reaching, as it applies to any entity receiving federal funds, like Medicare and Medicaid reimbursement, and entities could lose this funding if found non-compliant.<sup>225</sup> While the opportunity to submit comments on the proposed rule closed at the end of March 2018, the final rule has yet to be released.<sup>226</sup>

## VII. RECOMMENDATIONS

The United States currently finds itself at an impasse between the free exercise of religion and securing the rights and civil liberties of its citizens. While the intersection between increased rights of the LGBT population—brought on by increased awareness and visibility of this community and their struggle—and the religious beliefs of others are not likely to be resolved in the near future, the following proposals can ensure that neither side of this important debate is unduly marginalized.

One way to better and more fairly balance one individual’s religious beliefs with another individual’s right to medically necessary health care services would be to amend the RFRA and restore its scope as it was originally intended. After the Supreme Court decision in *Employment Division v. Smith*, Congress recognized that the state of Oregon did not provide an adequate justification for burdening the ex-employees’ exercise of religion by denying unemployment benefits because of their ceremonial use of peyote.<sup>227</sup> In response to this decision, recognizing that “the compelling interest test . . . is a workable test for striking *sensible*

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222. *See id.*

223. *Id.* at 3898

224. *Id.* at 3881, 3896-98.

225. *Id.* at 3891, 3896. The proposed rule requires recipients of federal funds to submit a written certification assuring their compliance with the rule and applicable laws as a condition of receiving federal funds.

226. *Id.* at 3880

227. *See* 42 USC § 2000bb-4 (1993); *See also* *Emp’t Div., Dept. of Hum. Resources of Or. v. Smith*, 494 US 872, 874 (1990).

*balances* between religious liberty and competing prior governmental interests,” Congress passed the RFRA in order to restore the application of the compelling interest test in cases where an individual’s exercise of religion is substantially burdened by the government.<sup>228</sup>

The RFRA and its purpose was not considered a controversial or polarizing law when initially enacted;<sup>229</sup> it is only recently since the statute’s passing that this law has been impermissibly expanded beyond its original intent. For example, the American Civil Liberties Union (“ACLU”), an organization that touts itself as “the national leader in the struggle for religious freedom” for almost one hundred years, withdrew its support of RFRA in 2015.<sup>230</sup> While the ACLU supported RFRA’s enactment in 1993 because the law protected the religious exercise of others who did not impact anyone else, the organization currently believes that the RFRA is now used as a means of discriminating against others, particularly women and the LGBT community.<sup>231</sup> As Louise Melling, Deputy Legal Director of the ACLU put it:

Yes, religious freedom needs protection. But religious liberty doesn’t mean the right to discriminate or to impose one’s views on others. The RFRA wasn’t meant to force employees to pay a price for their employer’s faith, or to allow businesses to refuse to serve gay and transgender people, or to sanction government-funded discrimination. In the civil rights era, we rejected the claims of those who said it would violate their religion to integrate. We can’t let the RFRA be used as a tool for a different result now . . . Religious freedom will be undermined only if we continue to tolerate and enable abuses in its name.<sup>232</sup>

Previous and current legislative efforts provide guidance in amending RFRA. In July 2017, Congressmen Scott and Kennedy reintroduced legislation to amend the RFRA titled the “Do No Harm

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228. 42 USC § 2000bb(b) (1993).

229. Bomboy, *supra* note 114.

230. *Religious Liberty: What’s at Stake*, ACLU, <https://www.aclu.org/issues/religious-liberty> (last visited March 18, 2017); *See also* Louise Melling, *ACLU: Why We Can No Longer Support the Federal ‘Religious Freedom’ Law*, WASH. POST (June 25, 2015), [https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5\\_story.html?utm\\_term=.5d474b2693c2](https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.5d474b2693c2).

231. Melling, *supra* note 230.

232. *Id.*

Act.”<sup>233</sup> The Do No Harm Act, if passed, would create an exception that would prohibit RFRA’s application in instances where such application would harm third parties that are protected by other federal laws.<sup>234</sup> Effectively, this would ensure that the transgender community would be able to timely access (often lifesaving) health care services, as their protections under Section 1557 would not be displaced by a provider or insurance company’s RFRA claim.<sup>235</sup> While this bill was most recently referred to a Congressional Subcommittee for further action,<sup>236</sup> it did not make it out of committee during the last congressional term when it was initially introduced.<sup>237</sup>

As similarly recognized by the Do No Harm Act, amending the RFRA will require more than simply including a statement in the statute’s language stating that the RFRA should not be construed as to permit discrimination or infringe on other’s civil rights and liberties. Rather, a closer analysis must be completed. Achieving sensible balances between compelling government interests and religious liberty means recognizing that not only does the government have a compelling interest in protecting the civil rights and liberties of its citizens and ensuring equal protection under the law, but also that one individual’s assertion of religious liberty should not detrimentally impact the lives of others. In order for prudent balances to be attained, additional findings must be added to RFRA in light of the *Hobby Lobby* decision, findings that recognize that the free exercise of religion cannot be used as a means of perpetuating discrimination or causing harm to others.

In his *Hobby Lobby* opinion, Justice Alito declined to provide a standard that could be applied in future cases regarding how to assess religious beliefs against compelling government interests involving the medical care of third parties.<sup>238</sup> Due to this lack of guidance, the possibility that an asserted religious belief will trump an asserted government interest in the rights of others seems like the likely, uniform outcome going forward unless clarification on how to assess these cases is provided.

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233. Antonia Blumberg, *These Congressmen Are Trying to Curb Religious Freedom Abuses*, HUFFINGTON POST (July 13, 2017), [http://www.huffpost.com/entry/do-no-harm-act\\_us\\_5967c542e4b03389bb160cb5](http://www.huffpost.com/entry/do-no-harm-act_us_5967c542e4b03389bb160cb5).

234. H.R. 3222, 115th Cong. § 3 (2017).

235. See H.R. 3222, 115th Cong. § 3(d)(1)(D)(2017) (“This section does not apply to any provision of law or its implementation that provides or requires . . . access to, information about, referrals for, provision of, or coverage for, any health care item or service.”).

236. H.R. 3222, 115th Cong. (as referred to Comm. on the Judiciary, July 13, 2017).

237. H.R. 5272, 114th Cong. (as referred to the Comm. on the Judiciary, May 18, 2016).

238. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

Keeping this in mind, any amendment to the RFRA should require an additional analysis regarding RFRA cases that implicate the rights of third parties, such as access to or insurance coverage of medically necessary care.<sup>239</sup> The first of two analyses in this ‘RFRA Two-Step’ would be to apply the compelling interest test, as is required by RFRA in its present form, in order to determine whether the government is permitted to substantially burden the free exercise of an individual’s religion.<sup>240</sup> If the individual asserting the RFRA claim prevails after this step, the second ‘step’ would require courts to determine whether the plaintiff’s assertion under RFRA would cause harm to third parties; if found that third parties would be harmed by the prevailing RFRA claim, the statute would prescribe that an additional analysis be completed.

Ideally, this additional analysis would require courts to balance the interests of the plaintiff bringing the RFRA claim against the harm that a successful RFRA claim would bring or has brought to third parties. In the context of Section 1557 cases, this analysis could involve looking a factors such as the economic burden imposed on a patient if their insurance company excludes coverage for transition-related services, any detrimental impact or harm on the patient’s health if they are denied services or treatment because of their gender identity, and access and availability from other medical facilities and providers that are able to provide the health care services in contention.<sup>241</sup>

While amending RFRA in a way that would allow courts to take third party rights and harms into consideration will provide a more balanced approach going forward, additional action can be taken in order to increase the transgender community’s access to necessary medical care. For example, increasing the availability of transgender

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239. While the scope of this Note is limited to analyzing the tension between RFRA and transgender health care rights, any amendment to RFRA should undoubtedly implicate a broader scope of applicability. *See e.g.*, H.R. 3222, 115th Cong. § 3 (2017) (recognizing that assertions under RFRA should not undermine protections under statutes such as the Americans with Disabilities Act, the Violence Against Women Act, child labor protections, and requirements for employers to pay their employees and provide other benefits).

240. 42 U.S.C. § 2000bb-1(b) (1993).

241. This proposed second analysis in the RFRA Two-Step is inspired by the undue burden analysis courts have implemented for over two decades regarding a woman’s access to abortion. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (stating that the standard announced in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992) “requires the courts consider the burdens a law imposes . . . together with the benefits those laws confer.”) While this analysis is applied against the State action affecting a woman’s access to abortion, the balancing test used is nonetheless helpful in considering changes to RFRA.

health services at federally funded health clinics would provide greater access to needed services and care. A current gap exists in the services provided by these clinics, which typically only provide primary and preventative care, leaving underserved populations without specialty care.<sup>242</sup> Additionally, efforts should be made to create a network of medical professionals in the United States that are able to provide treatment and services to the transgender community.<sup>243</sup> Through the use of telemedicine, transgender individuals who do not have access to knowledgeable providers within their locality would be able to receive care from out-of-state physicians willing to provide care and who are attune to the specific health care needs of the transgender community.<sup>244</sup>

## VIII. CONCLUSION

Section 1557 of the ACA was the first of its kind in protecting transgender individuals from discriminatory treatment in health care at the federal level. While its impact was originally only threatened by a partial injunction from a federal district court<sup>245</sup> its longevity and future protections for the transgender community are uncertain due to the current administration and Congress' position on the rights of transgender individuals. One of the largest attacks comes from Roger Severino, the current director of HHS' Office of Civil Rights, who previously worked at The Heritage Foundation and co-authored a report arguing that Section 1557 created "special privileges" for transgender Americans and argued for the rule's repeal.<sup>246</sup> Other attacks

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242. See *Access to Specialty Care in Federally Qualified Health Centers*, AHRQ HEALTH CARE (July 17, 2013), <https://innovations.ahrq.gov/issues/2013/07/17/access-specialty-care-federally-qualified-health-centers>.

243. For example, the telemedicine company MyOnCallDoc announced in May 2016 that it would begin a pilot program involving over 1,000 physicians providing telemedicine services to the transgender community. See *MyOnCallDoc Announces Pilot of Transgender Telehealth Program*, NEWSWIRE (May 18, 2016), <https://www.newswire.com/news/myoncalldoc-announces-pilot-of-transgender-telehealth-program-11104636>.

244. Monica Griffin, *LGBT & Telemedicine: Why it's Important*, WECOUNSEL (Dec. 30, 2016) <https://www.wecounsel.com/lgbt-telemedicine-why-its-important/>.

245. See generally *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

246. Emmarie Huettelman *At New Health Office, 'Civil Rights' Means Doctors' Right To Say No To Patients*, KAISER HEALTH NEWS (Mar. 5, 2018), <https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>; Roger Severino & Ryan T. Anderson, *Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians*, THE HERITAGE FOUND.

include President Trump's most recent military ban prevents transgender Americans diagnosed with gender dysphoria from serving in the military, although it is unclear how it will be implemented.<sup>247</sup> Nevertheless, this is not an administration that will serve as a champion for the LGBT community.

Some silver linings exist, indicating that the fight to protect the transgender community's rights will continue. Organizations like the ACLU and Lambda Legal will continue to defend the rights of American citizens against injustice and embolden others to take a stand against unjust and unlawful government action.<sup>248</sup> Members of Congress on both sides of the aisle have recommitted their fight for transgender rights with the relaunch of the Transgender Equality Task Force, a coalition of representatives who are pledging their commitment to advocate for the rights of the transgender community at the federal level.<sup>249</sup> Efforts are also underway at the state level, as New York State recently announced that health insurance carriers cannot discriminate on the basis of gender identity, ensuring these protections will remain intact for transgender citizens of this state regardless of whether the Trump Administration keeps Section 1557 protections in place.<sup>250</sup> While it may be an uphill battle in ensuring Section 1557 protections for the transgender community remain intact, efforts such as these indicate that transgender rights will not be forgotten and left behind.

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2 (Jan. 8, 2016), available at: <http://thf-reports.s3.amazonaws.com/2015/BG3089.pdf>.

247. David A. Graham, *The Murkiness of Trump's New Transgender Military Ban*, THE ATLANTIC (Mar. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/03/trumps-new-transgender-military-ban/556445/>.

248. See *About the ACLU*, ACLU, <https://www.aclu.org/about-aclu> (last visited Mar. 18, 2017); *About Us*, LAMBDA LEGAL, <https://www.lambda-legal.org/about-us> (last visited Apr. 7, 2018).

249. Mary Emily O'Hara, *Congress Relaunches Transgender Equality Task Force*, NBC NEWS (Mar. 2, 2017), <http://www.nbcnews.com/feature/nbc-out/congress-relaunches-bipartisan-transgender-equality-task-force-n728106>.

250. Gino Fanelli, *Cuomo Announces Transgender Health Care Protections*, ROCHESTER BUS. J. (Aug. 16, 2017), <http://rbj.net/2017/08/16/cuomo-announces-transgender-health-care-protections/>.