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Note

Recognizing Transgender, Intersex, and Nonbinary People in Healthcare Antidiscrimination Law

*Derek Waller**

“What are you?”

— A physician to a transgender patient.¹

“THE DIAGNOSIS IS INCONSISTENT WITH THE PATIENT’S GENDER.”

— An insurer’s reason for rejecting a transgender patient’s claim.²

“Affirmative care means treating trans people like people . . . it’s not that hard.”

— From an interview with Afton Bradley, Program Manager for Transgender Health at Planned Parenthood in Richmond, Virginia.³

* J.D. Candidate 2019, University of Minnesota Law School. I would like to thank several people for their generous support as I wrote this Note. Thanks to Professor Amy Monahan for serving as my advisor and providing me detailed and helpful feedback, Professor Jessica Clarke for helping me develop this topic and introducing me to antidiscrimination law, and Professor Kristin Hickman for a helpful discussion about statutory interpretation. Additionally, thanks to Trevor Matthews and Franklin Guenther in the Note & Comment Department for their extensive feedback on many drafts and to the staff and editors of the *Minnesota Law Review* for their editing contributions. Copyright © 2018 by Derek Waller.

1. Neda Ulaby, *Health Care System Fails Many Transgender Americans*, NPR (Nov. 21, 2017), <https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans>.

2. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *18 (D. Minn. Mar. 16, 2015).

3. Ulaby, *supra* note 1 (paraphrasing an interview with Afton Bradley).

INTRODUCTION

Transgender people frequently experience discrimination by healthcare providers and insurers. Providers discriminate by treating transgender patients differently than cisgender⁴ patients. They have treated transgender patients with hostility, refused to provide treatment, and failed to meet their unique health needs.⁵ Insurers, both private and public, discriminate by refusing to pay for transgender patients' healthcare and denying them access to medically necessary care.⁶ These types of discriminatory practices prevent transgender people from accessing the care they need to have healthy and productive lives.

Reports from transgender people indicate that anti-transgender discrimination in healthcare is widespread. In the 2015 U.S. Transgender Survey, the largest and most comprehensive survey of transgender people ever conducted,⁷ transgender respondents reported that they experience discrimination at alarming rates. Fifty-five percent of survey respondents who

4. "Cisgender" refers to a person whose gender identity corresponds to her sex assigned at birth. See *Cisgender*, MERRIAM-WEBSTER (Aug. 21, 2018), <https://www.merriam-webster.com/dictionary/cisgender>.

5. See, e.g., SANDY E. JAMES ET AL., NAT'L. CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 10 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter 2015 TRANSGENDER SURVEY]; Suresh Bada Math & Shekhar P. Seshadri, *The Invisible Ones: Sexual Minorities*, 137 INDIAN J. MED. RES. 4, 4–5 (2013).

6. 2015 TRANSGENDER SURVEY, *supra* note 5, at 95 (reporting transgender respondents experienced issues with insurance coverage for care related to both gender transitioning and general reproductive health).

7. The survey relied on self-reported data from 27,715 respondents and is the largest survey of transgender people in the United States. 2015 TRANSGENDER SURVEY, *supra* note 5, at 4. A recent poll by NPR, the Robert Wood Johnson Foundation, and the Harvard T.H. Chan School of Public Health supports these findings and suggests that the data has not changed significantly since 2015. See Joe Neel, *Poll: Majority of LGBTQ Americans Report Harassment, Violence Based on Identity*, NPR (Nov. 21, 2017), <https://www.npr.org/2017/11/21/565327959/poll-majority-of-lgbtq-americans-report-harassment-violence-based-on-identity>.

sought insurance coverage for a gender-affirming—i.e., transition-related—procedure⁸ had their claims denied.⁹ Of those respondents who received coverage for a gender-affirming procedure, twenty-one percent could not find an in-network provider who offered the procedure.¹⁰ Twenty-five percent of respondents who sought coverage for gender-affirming hormone therapy had their claims denied.¹¹ Thirteen percent of respondents who sought coverage for so-called “sex-specific” routine medical care, such as a cervical cancer screening, had their claims denied.¹² One-third of respondents reported one or more negative experiences with a medical provider in the last year.¹³ Nearly one-fourth of respondents avoided seeking healthcare they needed because they feared being mistreated.¹⁴

While facing significant barriers to care, transgender people also experience unique and significant health needs.¹⁵ Thirty-nine percent of transgender people surveyed reported currently experiencing serious psychological distress, compared with five percent of the overall U.S. population.¹⁶ Nearly half of survey respondents reported serious thoughts of suicide in the past year, and seven percent of respondents had attempted suicide in the past year, which is nearly twelve times the rate of suicide in the general U.S. population.¹⁷

These negative health outcomes are preventable. Transgender people who receive gender-affirming services report significantly lower rates of psychological distress.¹⁸ For transgender people who successfully transition with support,¹⁹

8. Gender-affirming procedures are services that align a person’s physiological anatomy with their gender identity. These services are also commonly referred to as transition-related care. See FENWAY HEALTH, GLOSSARY OF GENDER AND TRANSGENDER TERMS 4 (2010), http://fenwayhealth.org/documents/the-fenway-institute/handouts/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf.

9. 2015 TRANSGENDER SURVEY, *supra* note 5, at 95.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 97.

14. *Id.* at 98.

15. *Id.* at 93.

16. *Id.* at 106.

17. *Id.* at 112–13.

18. *Id.* at 107.

19. Contrary to a popular misconception, many transgender people choose not to pursue genital surgical interventions. People have different goals for their gender expression, but those are often met through enhancing the masculinization or feminization of their appearance. Additionally, genital surgeries are not

the vast majority experience an improved quality of life.²⁰ Gender-affirming services not only improve the quality of life for transgender people, they can help to ensure they have a life to enjoy. As a transgender health manager noted, receiving gender-affirming care leads to a dramatic reduction in suicide attempts.²¹ One respondent to the 2015 U.S. Transgender Survey reported:

I have struggled with depression and anxiety ever since puberty. I've failed classes, isolated myself, and considered suicide because of this. A year ago, I felt hopeless and had daily suicidal thoughts, and today I've got a plan for the future and haven't had a serious suicidal thought in months. I firmly believe this is because of my transition. I feel so much more comfortable and happy than I've ever been.²²

Many transgender activists echo this experience: access to gender-affirming health services can dramatically improve health outcomes.²³ However, the discrimination transgender people experience prevents them from accessing health services.²⁴ Reducing discrimination can therefore improve health outcomes for transgender people.

The Patient Protection and Affordable Care Act (ACA)²⁵ provides an opportunity to reduce the discrimination experienced by transgender people²⁶ and other sexual minorities.²⁷ It contains

recommended for all transgender people due to personal preferences or potential medical risks. See Dean Spade et al., *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497, 497–98 (2010).

20. See Tim C. van de Grift et al., *Surgical Satisfaction, Quality of Life, and Their Association After Gender-Affirming Surgery: A Follow-Up Study*, 44 J. SEX & MARITAL THERAPY 138, 139 (2018) (finding transgender individuals reported an increased quality of life after receiving surgery to align their physical anatomy with their gender identity).

21. Ulaby, *supra* note 1.

22. 2015 TRANSGENDER SURVEY, *supra* note 5, at 106.

23. See Spade et al., *supra* note 19, at 498–99 (describing negative health consequences faced by trans people who do not receive gender-affirming care, including mental health issues and HIV, and the incarceration of trans people who may break the law in order to obtain the healthcare services they need).

24. See, e.g., *id.* at 499–500 (showing how the elimination of Medicaid coverage for transgender people creates a discriminatory barrier of access to health services).

25. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 260 (2010).

26. Although “lawsuits will not eliminate health disparities,” private rights of action are an important mechanism that allow individuals to defend their right to live without experiencing discrimination. See DANIEL E. DAWES, 150 YEARS OF OBAMACARE 222 (2016) (quoting William H. Frist, *Overcoming Disparities in U.S. Health Care*, 24 HEALTH AFF. 445, 447 (2005)).

27. This Note will use “sexual minorities” as a shorthand for transgender,

an antidiscrimination provision, Section 1557, that prohibits healthcare providers and insurers from discriminating on the basis of sex.²⁸ However, it does not expressly refer to transgender people.²⁹ Although some federal courts have found that the statute prohibits discrimination against transgender people, some have reached the opposite conclusion.³⁰ Courts and administrative agencies dispute whether the word “sex” applies to the types of discrimination experienced by transgender people.³¹ Because the statute contains no definition of sex, courts must engage in statutory interpretation to determine whether the phrase “on the basis of sex”³² applies to sexual minorities.³³

This Note proposes a solution to that problem by presenting an interpretation of the ACA that would prohibit discrimination against transgender, intersex, and nonbinary people.³⁴ By considering contemporary scientific understandings of sex characteristics and classification, this Note argues that “on the basis of sex” in Section 1557 refers to discrimination due to any of the various traits that determine a person’s biological sex, including gender identity. Courts have misinterpreted Section 1557 by relying on assumptions about gender and sexuality to define sex

intersex, and nonbinary people. However, this terminology is imperfect because the term “sexual minorities” is typically also used to refer to lesbian, gay, and bisexual people. See, e.g., Valerie K. Blake, *Remedying Stigma-Driven Health Disparities in Sexual Minorities*, 17 HOUS. J. HEALTH L. & POL’Y 183, 184 (2017); Math & Seshadri, *supra* note 5, at 4 (“Usually, [s]exual minorities comprise of lesbian, gay, bisexual and transgender individuals.”).

28. Patient Protection and Affordable Care Act § 1557, 42 U.S.C. § 18116 (2012).

29. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 260 (2010).

30. Compare *Prescott v. Rady Children’s Hosp.*, 265 F. Supp. 3d 1090, 1098–99 (S.D. Cal. 2017) (finding that the ACA protects transgender individuals from discrimination), and *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015) (deferring to the Department of Health and Human Services (HHS) after finding transgender protections in the ACA’s non-discrimination provision ambiguous), with *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016) (holding that the ACA unambiguously excludes transgender people from its non-discrimination provision).

31. Compare *Prescott*, 265 F. Supp. 3d at 1099 (“[S]ex under Title VII encompasses both sex . . . and gender.”) (internal quotation omitted), with *Franciscan All.*, 227 F. Supp. 3d at 687–89 (understanding “sex” to exclude gender identity).

32. See 20 U.S.C. § 1681(a) (2012).

33. See, e.g., *Franciscan All.*, 227 F. Supp. 3d at 687–89 (engaging in statutory interpretation to define “sex”).

34. For definitions about each of these identities, see *infra* Part I.A.

discrimination.³⁵ This Note provides a framework that courts can use to reach a more accurate statutory definition of sex in Section 1557 by considering contemporary medical science about sex and gender. By using principles of statutory interpretation to interpret sex in a manner that recognizes transgender, intersex, and nonbinary identities, this Note offers litigants and courts a new way to understand sex discrimination in healthcare antidiscrimination law.³⁶ As transgender rights attorney M. Dru Levasseur has argued,³⁷ the key to progress on transgender rights is to persuade courts “to gain a clear understanding of who transgender people are using the latest medical science.”³⁸ This

35. *See Franciscan All.*, 227 F. Supp. 3d at 687–89 (finding sex indicates a binary definition and excludes gender identity).

36. By providing a framework for courts to properly interpret the text of Section 1557, this Note diverges from the strategies proposed by other student scholars who have argued for amendments to the ACA or regulations to recognize transgender identities. *See, e.g.*, John E. Farmer, Note, *Charting the Middle Course: An Argument for Robust but Well-Tailored Health Care Discrimination Protection for the Transgender Community*, 52 GA. L. REV. 225, 231–32 (2017) (arguing for a statutory change to the ACA to protect transgender people); Sarah E. Gage, Note, *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 NEW ENG. L. REV. 499, 530–33 (2015) (arguing that the ACA failed to provide protections for transgender people and that HHS should implement regulations requiring insurers to cover transgender-specific health services); Rachel C. Kurzweil, Note, “Justice Is What Love Looks Like in Public”: *How the Affordable Care Act Falls Short on Transgender Health Care Access*, 21 WASH. & LEE J. C.R. & SOC. JUST. 199, 259–60 (2014) (arguing that HHS should promulgate a regulation interpreting Section 1557 to prohibit gender-based discrimination); *see also* Samuel Rosh, Note, *Beyond Categorical Exclusions: Access to Transgender Healthcare in State Medicaid Programs*, 51 COLUM. J.L. & SOC. PROBS. 1, 2–3 (2017) (arguing that Medicaid laws should cover gender transition procedures and other transgender healthcare coverage).

37. “M. Dru Levasseur is Senior Attorney and Transgender Rights Project Director for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people living with HIV.” *See M. Dru Levasseur*, LAMBDA LEGAL, <https://www.lambdalegal.org/about-us/staff/m-dru-levasseur> (last visited Oct. 15, 2018).

38. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015). Other legal scholars have advocated for a reading of the ACA that protects transgender people. This Note adds to these works by providing a statutory interpretation of Section 1557 that protects transgender, nonbinary, and intersex people. *See, e.g.*, Nina Zhang, *Patient Protection and Affordable Care Act Could Expand Coverage for Gender Dysphoria*, 26 HEALTH L. 26, 27–28 (2013) (arguing the ACA’s antidiscrimination provision expands insurance coverage for transgender individuals); Wyatt Fore, Note, *Trans/Forming Healthcare Law: Litigating Antidiscrimination Under the Affordable Care Act*, 28 YALE J.L. & FEMINISM 243, 244–48 (2017) (interpreting the ACA’s antidiscrimination provisions to include transgender people); Liza Khan, Note,

Note answers this call in the context of healthcare antidiscrimination law by using medical science to recognize transgender, intersex, and nonbinary identities in Section 1557's definition of sex.

Healthcare law is an especially appropriate context for courts to consider a medically accurate definition of sex. Physicians have a uniquely powerful role in determining a person's sex,³⁹ so the legal definitions of sex should reflect that medical reality. Further, Section 1557 should be interpreted consistently with the purposes of the ACA, which adopted "a series of interlocking reforms" designed to expand access to health services.⁴⁰ The Supreme Court has recognized that the unique history of the ACA requires courts to interpret its provisions to align with the statute's purpose and to protect the ACA's architecture of healthcare reforms.⁴¹ Defining sex discrimination in Section 1557 in a way that protects sexual minorities increases access to healthcare, consistent with the goals of the ACA.⁴²

Part I explores how sex is defined in medical science and in antidiscrimination law. It concludes by comparing these definitions with how courts have interpreted sex discrimination in the context of Section 1557. Part II critiques the approach courts have taken to defining sex and proposes a definition of sex discrimination that applies to sexual minorities. It reaches this interpretation of Section 1557 by using traditional tools of statutory construction. Part III demonstrates how the definition of sex

Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform, 11 YALE J. HEALTH POL'Y L. & ETHICS 375, 377–79 (2011) (arguing there is a gap between developments in transgender health and the law, which will impact interpretations of the ACA's antidiscrimination provision); Jennifer Wong, Note, *Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights*, 31 LAW & INEQ. 471, 472–73 (2013) (examining various health insurance options for transgender individuals to determine which combinations best secure access to gender transitioning procedures and care).

39. See Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSSEXUAL RIGHTS 51, 52 (Currah et al. eds., 2006) [hereinafter Greenberg 2006].

40. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

41. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 544–45 (2012), and *King*, 135 S. Ct. at 2505–06, the Supreme Court chose to interpret provisions of the ACA in a manner that protected Congressional intent. See *infra* Part III.

42. Cf. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 597 (Ginsburg, J., concurring in part and dissenting in part) (finding Congress enacted the ACA to increase individuals' access to affordable healthcare regardless of any preexisting conditions).

proposed in Part II furthers the purposes of the ACA. Part III also explains why the Supreme Court's analysis of the ACA demands interpreting the statute in a manner consistent with the statute's purpose.

I. DEFINING SEX

This Part summarizes current medical and legal understandings of sex classifications, with a focus on how intersex, transgender, and nonbinary traits are defined in medicine and in antidiscrimination law. Section A provides an overview of current medical understandings of sex and gender. Section B contrasts those understandings with legal definitions of sex and gender in antidiscrimination law. Section C assesses how the ACA's prohibition on sex discrimination in healthcare settings applies to sexual minorities.

A. DEFINING SEX IN MEDICAL SCIENCE

This Section provides an overview of the basic definitions of sex and gender, as understood in contemporary medical science. Although these understandings are not universal, the definitions described herein reflect the opinions of medical experts and of transgender, intersex, and nonbinary people. This Section also provides an overview of transgender, intersex, and nonbinary identities with a focus on how the medical community classifies each identity.

1. Sex and Gender

Sex commonly refers to a person's status as male, female, or neither because of biological factors, especially those factors relating to a person's reproductive anatomy.⁴³ Biological sex is typically determined by a physician at birth based on an assessment of the newborn's external genitalia.⁴⁴ If the child has a penis of adequate size, i.e. one that the physician determines will eventually be capable of performing penetrative vaginal sex,⁴⁵ the child is classified as male.⁴⁶ In the absence of an adequate penis,

43. Greenberg 2006, *supra* note 39, at 52.

44. *Id.*

45. Despite this practice, the size of a newborn's penis has not been reliably correlated with penis size later in life. ANNE FAUSTO-STERLING, *SEXING THE BODY* 58 (2000) [hereinafter FAUSTO-STERLING 2000].

46. JULIE A. GREENBERG, *INTERSEXUALITY AND THE LAW: WHY SEX MATTERS* 16 (2012) [hereinafter GREENBERG 2012].

the child is typically classified as female.⁴⁷ This practice of sex assignment is still prevalent among physicians.⁴⁸

In contrast to sex, gender identity refers to a person's "innermost concept of self as male, female, a blend of both or neither."⁴⁹ Gender identity can also be described as "brain sex" to emphasize that it is a psychological factor.⁵⁰ While sex is commonly considered biological and objective, gender is considered social and inherently subjective.⁵¹ Gender identity may be the same as or different from a person's biological sex characteristics.⁵²

Biological determinants of sex in humans are far more complex than common beliefs of sex and gender suggest. Medical experts consider several criteria in determining sex: "genetic or chromosomal sex, gonadal sex, internal morphologic sex, genitalia, hormonal sex, phenotypic sex, assigned sex/gender of rearing, and self-identified sex."⁵³ For most people, each of these factors indicates one of the binary sexes.⁵⁴ However, for an estimated 1.7% of people, these factors do not align exclusively with the male or female sex.⁵⁵ For some people, any one of these

47. *Id.*

48. See FAUSTO-STERLING 2000, *supra* note 45, at 48–50 (detailing the sex assignment process for infants with atypical genitals). These practices, though common, are not based on evidence-based science, but on heteronormative assumptions about sex. See KATRINA KARKAZIS, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 138–41 (2008) (describing how genital surgeries performed on intersex children seek to produce genitals that reflect heteronormative forms of sexual desire).

49. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Oct. 15, 2018).

50. Levasseur, *supra* note 38, at 955 (citing Rachael Wallbank, *Re Kevin In Perspective*, 9 DEAKIN L. REV. 461, 461–62, 467, 493 (2004)).

51. See AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 1 (2014), <http://www.apa.org/topics/lgbt/transgender.pdf> [hereinafter AM. PSYCHOLOGICAL ASS'N] ("Sex is assigned at birth . . . [whereas] [*g*]ender refers to . . . socially constructed roles.").

52. See, e.g., HUM. RTS. CAMPAIGN, *supra* note 49.

53. Greenberg 2006, *supra* note 39, at 54 (citing JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES 4 (2d ed. 1994)).

54. *Id.* at 55.

55. See FAUSTO-STERLING 2000, *supra* note 45, at 53 tbl.3.2 (calculating that approximately 1.7% of all people are intersex). *But see* Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RES. 174, 174–75 (2002) (arguing that Fausto-Sterling's estimate is 100 times too high because it includes syndromes most clinicians do not define as intersex and that

factors may in itself be ambiguous. For example, chromosomal sex is typically assumed to be exclusively “XX” or “XY,” but physicians have discovered people with other combinations, “including XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO.”⁵⁶ Other people experience ambiguities among different sex factors.⁵⁷ For example, androgen insensitivity syndrome (AIS) is a hormonal syndrome that occurs when a genetic male, i.e. a person with XY chromosomes, cannot process androgens, which are hormones required to develop male sex characteristics.⁵⁸ For a fetus with AIS, external female genitalia will form.⁵⁹ Despite female genitalia at birth, the child will not have female reproductive organs.⁶⁰

2. Intersex⁶¹

When one of the sex determining factors is ambiguous, physicians will often diagnose an infant with a disorder of sex development (DSD).⁶² For example, chromosomal sex disorders include Klinefelter and Turner syndrome;⁶³ gonadal sex disorders include Swyer syndrome;⁶⁴ external organ anomalies are classified as hermaphroditism.⁶⁵ Ambiguities within and among the first six factors of biological sex define a class of people known as

intersex should only describe people whose chromosomal sex is different than phenotypic sex or whose phenotype is not classifiable as either male or female).

56. Greenberg 2006, *supra* note 39, at 56. Despite this wide variety of variation in human chromosomal make-up, many physicians now consider genetic chromosomes to be the essential consideration when assigning sex to newborns. See KARKAZIS, *supra* note 48, at 106.

57. Greenberg 2006, *supra* note 39, at 58–60 (listing various non-chromosomal ambiguous sex factors and conditions).

58. *Id.* at 59.

59. *Id.*

60. *Id.*

61. For an excellent resource on legal issues faced by the intersexual community, see Pat Newcombe, *Blurred Lines—Intersexuality and the Law: An Annotated Bibliography*, 109 LAW LIBR. J. 221 (2017).

62. See Greenberg 2006, *supra* note 39, at 57–61 (providing definitions for various disorders of sexual development).

63. See *id.* at 57–58.

64. *Id.* at 58.

65. *Id.* at 59.

“intersex.”⁶⁶ Scientists have historically struggled to classify intersex conditions, but contemporary physicians are typically more familiar with DSDs.⁶⁷

Many intersex people experienced some form of surgical genital mutilation shortly after birth.⁶⁸ These procedures were performed throughout the twentieth century in the United States and some surgeons still practice them.⁶⁹ If a newborn’s external genitalia did not clearly indicate male or female sex, physicians would surgically alter the child’s genitalia, sometimes eliminating all sexual feeling by removing or altering genital tissue.⁷⁰ The Intersex Society of North America, founded by intersex activist Cheryl Chase in 1993,⁷¹ sought to end pediatric surgeries on children with ambiguous genitalia.⁷² The United Nations Commission on Human Rights now considers “genital-normalizing surgeries” a form of torture.⁷³ Intersex activism has made these practices less common today,⁷⁴ but physicians still

66. There is significant debate among intersex activists about how to define these various conditions. In this Note, I use the terminology approach taken by Julie Greenberg in *INTERSEXUALITY AND THE LAW* by referring to these conditions as intersex. I prefer not to characterize intersex conditions as disorders or medical problems that need to be solved. However, some activists prefer the term disorders of sex development (DSD) and have challenged the usefulness of the term intersex. See GREENBERG 2012, *supra* note 46, at 1, 92–93.

67. For a historical review of scientific and medical understandings of human sex classifications, see FAUSTO-STERLING 2000, *supra* note 45, at 30–44. Professor Fausto-Sterling notes how theories of intersexuality in the nineteenth century fit into a set of biological ideas about differences between social groups, such as Jews and Gentiles, whites and non-whites, and middle-class and working-class men. *Id.* at 39.

68. See, e.g., *id.* at 56–57.

69. See, e.g., *id.* at 48 (stating individual surgeons make personal decisions about which procedures to perform).

70. See GREENBERG 2012, *supra* note 46, at 5–6.

71. For an overview of the history of the intersex activist movement, see Newcombe, *supra* note 61, at 252–54.

72. SUSAN STRYKER, *TRANSGENDER HISTORY* 138–39 (2008) (describing Cheryl Chase’s history and the mission of the Intersex Society of North America to change medical treatments for children born with ambiguous genitalia).

73. Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 76, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (“[G]enital-normalizing surgeries . . . are rarely medically necessary, can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticized as being unscientific, potentially harmful and contributing to stigma.”).

74. See GEORGIANN DAVIS, *CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS* 76–79 (2015) (interviewing physicians who support intersex activists in resisting genital surgeries in infants); Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 *PEDIATRICS* e488, e493 (2006) (noting

pressure parents to consent to surgical interventions on intersex infants.⁷⁵

3. Transgender

People with otherwise harmonious sex determinants may nevertheless have an internal sense of sex that does not align with the other factors.⁷⁶ The American Psychological Association classifies this condition as gender identity disorder (GID),⁷⁷ and notes that the diagnosis is for people “who experience intense, persistent gender incongruence.”⁷⁸ For many transgender people, the diagnosis is stigmatizing because it pathologizes their identity as a mental disorder.⁷⁹ On the other hand, the diagnosis can be a useful tool for transgender people to obtain legal recognition and medical care.⁸⁰ In many states, a GID diagnosis or other evidence of medical treatment is a prerequisite to change a gender identity designation on official documents, including birth certificates,⁸¹ driver’s licenses, and passports.⁸² In this

that surgical interventions often lead to decreased sexual sensitivity, potential scarring, and other risks).

75. See DAVIS, *supra* note 74, at 82 (acknowledging pressures to consent to surgery). For a critique of this practice and an argument that parents cannot consent to genital-normalizing surgery for their intersex children, see Kishka-Kamari Ford, Note, “First, Do No Harm”—*The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL’Y REV. 469 (2001).

76. Greenberg 2006, *supra* note 39, at 61.

77. *Id.*

78. See AM. PSYCHOLOGICAL ASS’N, *supra* note 51, at 3.

79. Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS, *supra* note 39, at 274, 275 (“To be diagnosed with gender identity disorder is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis.”).

80. *See id.*

81. Washington recently adopted a regulation that allows anyone born in the state to change the sex designation on their birth certificate without approval from a physician. See WASH. ADMIN. CODE § 246-490-075 (2018); *Sex Designation Change on a Birth Certificate*, WASH. ST. DEPT’ HEALTH, <https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/SexDesignationChangeonaBirthCertificate> (last visited Oct. 12, 2018).

82. See Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 507–08 (2016) (outlining New York’s new policy allowing trans people to change sex information on government-issued identification forms, but still requiring corroboration from a medical professional to do so). See generally Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2007–2008) (identifying practices required to change gender classification in identification documents, sex-segregated facilities, and state Medicaid programs).

medical model of gender identity, a GID diagnosis is a prerequisite to obtaining gender-affirming procedures,⁸³ which are interventions such as surgical or hormonal treatments that align a person's physiology with their gender.⁸⁴

Gender-affirming procedures come in a variety of forms and only some alter any of the sex characteristics described above.⁸⁵ For example, hormone treatments and genital surgeries alter sex characteristics.⁸⁶ Hormone therapy is the most common form of gender-affirming treatment because it can enhance secondary sex characteristics such as voice, facial hair, breast tissue, and muscle mass.⁸⁷ Further, hormone therapy has a lower financial cost and entails fewer medical risks than surgery.⁸⁸ Some transgender people receive no medical interventions related to their gender presentation.⁸⁹ Despite the fact that most transgender people do not obtain genital surgeries, some states require proof of genital surgery in order to change legal identity documents.⁹⁰

83. For a summary and critique of the medical model, see Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003). See also Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 718 (2005) (contrasting the medical model, which explains gender nonconformity as psychological condition treated with medical services, with the biological model, which explains gender as solely a product of a person's biology).

84. Anne E. Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 COLUM. J. GENDER & L. 488, 500 n.59 (2014) (listing gender-confirming treatments and procedures).

85. See *id.* at 500–01; see also Spade et al., *supra* note 19, at 498 (providing examples of alternative forms of gender expression).

86. Spade et al., *supra* note 19, at 498.

87. *Id.*

88. See *id.*

89. *Id.* at 497.

90. For a critique arguing that these requirements unfairly coerce people into obtaining surgeries and that this coercion violates bioethical norms and principles, see Silver, *supra* note 84, at 489. See also Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 381–83 (surveying state requirements for changing gender identification on birth certificates, including those states that require proof of surgery).

4. Nonbinary

Individuals who do not identify with a gender identity of either male or female have a nonbinary gender identity.⁹¹ Nonbinary does not refer to a third gender, but rather to the constellation of genders that do not fit in the gender binary.⁹² These identities are not new,⁹³ but have recently received official recognition in some states.⁹⁴ For example, California recently passed a law allowing a nonbinary gender option on all state documents, including birth certificates.⁹⁵ Similarly, Washington now offers a third sex option on birth certificates.⁹⁶ Like transgender people, nonbinary people face discrimination in healthcare settings.⁹⁷

91. See *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L. CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive>.

92. For a basic overview of nonbinary people's identities, see *id.*

93. See, e.g., Gilbert Herdt, *Preface*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 11 (Gilbert Herdt ed., 1996) (describing how nonbinary identities have historically been recognized by many cultures, but that Western societies stigmatized these identities and persecuted nonbinary people).

94. For an overview of how laws in a variety of areas can include nonbinary identities, see Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. (forthcoming 2019). See also Monica Hesse, *When No Gender Fits: A Quest to Be Seen as Just a Person*, WASH. POST (Sept. 20, 2014), https://www.washingtonpost.com/national/when-no-gender-fits-a-quest-to-be-seen-as-just-a-person/2014/09/20/1ab21e6e-2c7b-11e4-994d-202962a9150c_story.html (describing efforts by nonbinary activists to have their gender identities recognized in an official capacity).

95. For more information on the Gender Recognition Act of 2017, see *SB-179 Gender Identity: Female, Male, or Nonbinary*, CAL. LEGIS. INFO., https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179; see also Christina Caron, *Californians Will Soon Have Nonbinary as a Gender Option on Birth Certificates*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/birth-certificate-nonbinary-gender-california.html> (explaining California's new law allowing for a nonbinary gender option on birth certificates).

96. See WASH. ADMIN CODE § 246-490-075 (2018); *Sex Designation Change on a Birth Certificate*, WASH. ST. DEPT' HEALTH, <https://www.doh.wa.gov/licensespermitsandcertificates/BirthDeathMarriageandDivorce/SexDesignationChangeonaBirthCertificate> (last visited Oct. 12, 2018).

97. See, e.g., NAT'L LGBT HEALTH EDUC. CTR., PROVIDING AFFIRMATIVE CARE FOR PATIENTS WITH NON-BINARY GENDER IDENTITIES 3; Hannah Mogul-Adlin, *Unanticipated: Healthcare Experiences of Gender Nonbinary Patients and Suggestions for Inclusive Care* (Apr. 2015) (unpublished M.P.H. thesis, Yale University), <http://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1196&context=ysphtdl>.

B. DEFINING SEX IN ANTIDISCRIMINATION LAW

Despite the advances in medical knowledge that have recognized transgender, intersex, and nonbinary identities, courts have been slow to apply that knowledge in the field of antidiscrimination law.⁹⁸ This Section provides a brief overview of how Title VII and Title IX, federal laws that prohibit sex discrimination in employment and education, respectively, apply to sexual minorities. These laws are relevant to the ACA's prohibition against sex discrimination because they use identical language to prohibit sex discrimination.

1. Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers against employees "because of . . . sex."⁹⁹ The statute does not define sex, but in the first twenty-five years of Title VII courts determined that the statute only prohibited discrimination on the basis of a person's sex assigned at birth.¹⁰⁰ This interpretation of Title VII changed in *Price Waterhouse v. Hopkins*, in which the Supreme Court found that discrimination against an employee because she failed to adhere to gender stereotypes constituted sex discrimination under Title VII.¹⁰¹ In *Price Waterhouse*, Price Waterhouse failed to promote a highly qualified employee, Ann Hopkins, because she was not effeminate enough.¹⁰² To improve her chances of making partner, a partner suggested that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁰³ Because her employer failed to promote her because of its perception of her adherence

98. See *infra* notes 106–08 and accompanying text.

99. 42 U.S.C. § 2000e-2(a)(1) (2012).

100. See Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 426 (2012) (citing *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, *4 (D.N.J. Sept. 10, 1975), *aff'd mem.*, 538 F.2d 319 (3d Cir. 1976)).

101. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (internal quotation omitted)).

102. *Id.* at 234–35.

103. *Id.* at 235.

to gender stereotypes, the Court held that Hopkins had successfully stated a claim of sex discrimination under Title VII.¹⁰⁴ Later courts have applied this theory of sex stereotyping to Title VII claims by transgender plaintiffs.¹⁰⁵ Recently, a small number of courts have reached the conclusion that transgender discrimination is per se sex discrimination without relying on *Price Waterhouse*.

a. Discrimination Because of Sex Stereotyping

Transgender plaintiffs have experienced mixed results when claiming Title VII protection from discrimination under a theory of sex stereotyping established by *Price Waterhouse*. Some federal courts have held that because transgender people fail to conform to sex stereotypes, employers who discriminate against transgender people do so because of sex.¹⁰⁶ For example, the Sixth Circuit held that “Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on failure to conform to stereotypical gender norms.”¹⁰⁷ Courts have also reached opposite conclusions, finding that a person’s status

104. *Id.* at 258.

105. *See infra* note 106 and accompanying text.

106. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1314, 1316–17 (11th Cir. 2011) (determining that discrimination against transgender individuals is sex discrimination due to the individuals’ gender nonconformity); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (holding that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior”); Schroer v. Billington, 577 F. Supp. 2d 293, 303–06 (D.D.C. 2008) (finding no difference for the purpose of determining Title VII liability whether an employer withdrew an offer of employment “because it perceived [the applicant] to be an insufficiently masculine man, an in sufficiently feminine woman, or an inherently gender-nonconforming transsexual”); *see also* Levasseur, *supra* note 38, at 974–77 (collecting cases where Title VII was held to apply to transgender plaintiffs). Lee, *supra* note 100, describes three types of theories courts have used to apply Title VII to transgender discrimination: (1) the Gender Nonconformity Approach, (2) the Per Se Approaches, and (3) the Constructionist Approach. *Id.* at 427. The Gender Nonconformity Approach finds that a plaintiff’s transgender status is irrelevant to the claim as long as the adverse employment action occurred because of the plaintiff’s perceived gender nonconformity. *Id.* (citing *Smith*, 378 F.3d at 572–73). The Per Se Approaches hold that the language of Title VII inherently protects transgender plaintiffs. *Id.* (citing *Schroer*, 577 F. Supp. 2d at 306–07). The Constructionist Approach sees both sex and gender as social constructs and determines that gender identity merits protection under Title VII. *Id.* (citing *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984)).

107. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018) (quoting *Smith*, 378 F.3d at 573).

as transgender does not offer protection under Title VII.¹⁰⁸ Sex stereotyping theory tends to be less successful when an employer discriminates solely on the basis of the employee's transgender status.¹⁰⁹

Although the sex stereotyping theory can offer transgender plaintiffs an opportunity to win employment discrimination cases, it requires them to argue that they have failed to conform to their biological sex as assigned at birth.¹¹⁰ As Diane Schroer, a transgender litigant in an employment discrimination case said, "I haven't gone through all this only to have a court vindicate my rights as a gender non-conforming man."¹¹¹ The attorney on this case noted that by pursuing the sex stereotyping strategy, "[i]t felt as though we would be disavowing Ms. Schroer's identity as a woman, and accepting society's discriminatory conception that transgender women are just men who want to dress as women."¹¹² This approach requires plaintiffs to introduce evidence of their sex assigned at birth and assume that it is their "true" biological sex.¹¹³ Additionally, if a plaintiff pursues this theory and alleges information about their sex and gender, the defendant, and the court, may want to investigate those claims by subjecting them to medical examinations.¹¹⁴

b. Discrimination Because of Transgender Identity

The Sixth Circuit has held that discrimination on the basis of a person's transgender status violates Title VII because "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated,

108. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218–20, 1227 (10th Cir. 2007) (siding with an employer who did not wish to accommodate a transgender employee's need to use a restroom matching her gender); *Goins v. W. Grp.*, 635 N.W.2d 717, 723–25 (Minn. 2011) (determining that the employer reasonably enforced a "cultural preference for restroom designation based on biological gender"); see also *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005) (dismissing a New York City Human Rights Law claim against a landlord who refused to renew a lease because of transgender people using the restroom).

109. See *Levasseur*, *supra* note 38, at 975–76 (explaining that courts have generally been less willing to apply sex stereotyping theory to discriminatory employment actions that are based solely on the plaintiff's gender transition).

110. See Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205, 212 (2010).

111. *Id.* at 205.

112. *Id.* at 212.

113. See *id.* at 214–15.

114. See *id.* at 216–17.

at least in part, by the employee's sex."¹¹⁵ In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Harris Funeral Homes fired Aimee Stephens because she "was no longer going to represent [her]self as a man [and] wanted to dress as a woman."¹¹⁶ Applying an approach used by the Seventh Circuit in a sexual orientation discrimination case, the court isolated the significance of Ms. Stephens's sex to the employer's termination decision.¹¹⁷ It found that if Stephens had been a cisgender woman "who sought to comply with the women's dress code," Harris Funeral Homes would not have fired her.¹¹⁸ This fact, the court concluded, "confirms that Stephens's sex impermissibly affected [her manager's] decision to fire Stephens."¹¹⁹ Under the Sixth Circuit's approach, a transgender plaintiff who was fired because of their transgender identity would not need to rely on sex stereotyping theory to receive the legal protection of Title VII. This approach does not require transgender plaintiffs to introduce evidence about their "true" biological sex, which is a central problem of arguing under the sex stereotyping theory.¹²⁰

The Sixth Circuit raised a second rationale for its decision in *Harris Funeral Homes* by finding that discrimination on the basis of sex "inherently includes discrimination against employees because of a change in their sex."¹²¹ It analogized sex under Title VII to religion¹²²: an employer who fires an employee for converting from one religion to another clearly discriminates on the basis of religion.¹²³ Similarly, because Harris Funeral Homes fired Stephens because of her desire to change her sex, it violated

115. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018). The court also followed circuit precedent and held that employment discrimination against transgender people is also actionable under a sex stereotyping theory. *Id.* at 572 (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

116. *Id.* at 576.

117. *Id.* at 575 (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc)).

118. *Id.*

119. *Id.*

120. See *supra* notes 111–14 and accompanying text.

121. *Harris Funeral Homes*, 884 F.3d at 575 (citing Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010) (arguing that sex under Title VII should be analogized to religion)).

122. *Id.* at 575–76.

123. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–307 (D.D.C. 2008) (comparing a change in religion to a change in sex to demonstrate how the statutory language of Title VII protects transgender individuals from discrimination).

Title VII's prohibition against sex discrimination.¹²⁴ The court disregarded Harris Funeral Homes' argument that unlike religion, sex is a biologically immutable trait.¹²⁵ It chose not to decide that issue and instead simply pointed out that Title VII requires sex and gender to be irrelevant to employment decisions.¹²⁶

2. Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational institutions that receive federal funds.¹²⁷ Although Title IX applies in education, not employment, courts often look to case law interpreting Title VII for guidance when interpreting Title IX.¹²⁸ In 2014, the U.S. Department of Education directed recipients of federal financial assistance to treat transgender students consistently with their gender identity.¹²⁹ However, not all schools followed that directive. Gavin Grimm,¹³⁰ a transgender student, sued his school for violating Title IX when it prohibited him from using a school bathroom consistent with his gender identity.¹³¹ The Fourth Circuit reversed the district court's dismissal of Grimm's claim, finding that Title IX protects transgender students from sex-based discrimination.¹³²

124. *Harris Funeral Homes*, 884 F.3d at 575.

125. *Id.* at 576.

126. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (Brennan, J., plurality opinion) (“[G]ender must be irrelevant to employment decisions.”)).

127. 20 U.S.C. §§ 1681–88 (2012).

128. *See, e.g.*, *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 865 n.4 (8th Cir. 2011); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000), *cert. denied*, 540 U.S. 811 (2003).

129. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS IN TITLE IX AND SINGLE SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRA-CURRICULAR ACTIVITIES 25 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

130. Although Mr. Grimm's name is confidential in the lawsuit because he was a minor when the litigation began, he has since become a public figure and transgender rights advocate. *See* Gavin Grimm (@GavinGrimmVA), FACEBOOK, https://www.facebook.com/pg/GavinGrimmVA/about/?ref=page_internal (last visited Oct. 15, 2018).

131. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 714–15, 723 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017), *remanded* 869 F.3d 286 (4th Cir. 2017) (directing the lower court to consider whether the case is moot because the student graduated high school).

132. *Id.* at 723.

The Fourth Circuit reached its holding in *G.G. ex rel. Grimm* because of guidance issued by the Department of Education.¹³³ The Department of Education guidance clarified an ambiguity in federal education regulations, so the Fourth Circuit considered whether the guidance deserved deference under the *Auer* doctrine.¹³⁴ This administrative law doctrine requires courts to engage in a two-step process to determine whether an agency's interpretation of its own regulation is permissible.¹³⁵ First, a court must determine whether the regulation is ambiguous.¹³⁶ Second, if the regulation is ambiguous, the court will give controlling weight to the agency's interpretation unless the interpretation is plainly erroneous or inconsistent with the regulation or statute.¹³⁷

Applying *Auer*, the *Grimm* court first considered whether the definition of "sex" in the regulation was ambiguous.¹³⁸ It found that although the regulation clearly considers sex to be binary, consisting only of male and female, sex is a sum of many different "morphological, physiological, and behavioral peculiarities."¹³⁹ Therefore, the definition of sex was ambiguous with regard to transgender students.¹⁴⁰ The court deferred to the Agency's judgment, finding in the regulation a reasonable basis for protecting transgender students from discrimination under Title IX.¹⁴¹ After the Trump administration revoked this guidance letter, the case was remanded for reconsideration by the district court.¹⁴²

On remand, the district court denied the school board's motion to dismiss and found that Grimm pleaded a claim for sex discrimination under Title IX.¹⁴³ Citing medical authority, the

133. *Id.*

134. *Id.* at 719.

135. This deference is generally known as either *Auer* or *Seminole Rock* deference. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

136. *Auer*, 519 U.S. at 457 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (noting that Congress had not "directly spoken to the precise question at issue")).

137. *Id.* at 461.

138. *G.G. ex rel. Grimm*, 822 F.3d at 719.

139. *Id.* at 721–22 (quoting *Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971)).

140. *Id.*

141. *Id.*

142. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 740 (E.D. Va. 2018).

143. *Id.* at 735.

court found that the school board policy that prevented Grimm from using the appropriate restroom made inaccurate assumptions about biological sex.¹⁴⁴ The board had assumed that biological sex is an inherent physiological distinction that separates males and females based on their external genitalia.¹⁴⁵ The court found that this policy created an unmanageable standard that disregarded students “who have had genital surgery, individuals whose genitals were injured in an accident, [and] those with intersex traits.”¹⁴⁶ According to the court, the board’s policy allowed it “to isolate, distinguish, and subject to differential treatment any student who deviated from what the Board viewed a male or female student *should* be, and from the physiological characteristics the Board believed that a male or female student *should* have.”¹⁴⁷ By using medical authority to determine that Grimm had stated a claim for sex discrimination under Title IX, the court applied an analytical approach that revealed the inaccurate assumptions inherent in transgender discrimination.

In similar cases, the Third Circuit, Sixth Circuit, Seventh Circuit, and several federal district courts¹⁴⁸ have ruled in favor of transgender students. The Third Circuit upheld a school policy that allowed students to use facilities that corresponded to their gender identity and found that this policy was consistent with Title IX.¹⁴⁹ The Sixth Circuit affirmed a preliminary injunction that required a school district to treat a transgender girl like other female students.¹⁵⁰ The Seventh Circuit granted a similar

144. *Id.* at 743 (citing Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017)).

145. *Id.* at 742–43.

146. *Id.* at 742.

147. *Id.* at 743.

148. *See, e.g.*, *Parents for Privacy v. Dall. Sch. Dist. No. 2*, No. 3:17-cv-01813, 2018 WL 3550267, at *23–26 (D. Or. July 24, 2018) (finding that a school policy that allowed transgender students to use facilities that corresponded to their gender identity did not violate Title IX).

149. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018); *see also* *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. App’x 492, 492–93 (9th Cir. 2009) (rejecting employee’s Title VII, Title IX, and constitutional claims); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (finding that an employee who expressed concern and disapproval that a transgender co-worker was using restrooms that corresponded to their gender identity could not state a claim of sex discrimination under Title VII).

150. *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016). This case is still active in the Southern District of Ohio. The United States, under President Trump, agreed to voluntarily dismiss the lawsuit, but the parents of

preliminary injunction, but the case settled in December 2017.¹⁵¹ In *M.A.B. v. Board of Education*, a federal district court in Maryland ruled in favor of a transgender student whose school prevented him from using the boys' locker room.¹⁵² Adopting the reasoning used in Title VII cases, the court held that transgender discrimination is per se sex discrimination under the sex stereotyping theory established by *Price Waterhouse*.¹⁵³ Applying this reasoning to a claim under Title IX, the court denied the defendant's motion to dismiss.¹⁵⁴

Similarly, in *Adams ex rel. Kasper v. School Board of St. Johns County*, a Florida federal district court ruled, after a bench trial, that a school district had violated Title IX by denying a transgender student access to facilities that corresponded to his gender identity.¹⁵⁵ At trial, the court considered testimony from a developmental and clinical psychologist who explained how a person's gender can be determined by many different characteristics, including "external genitalia, internal sex organs, chromosomal sex, gonadal sex, fetal hormonal sex, hypothalamic sex, pubertal hormonal sex, neurological sex, and gender identity and role."¹⁵⁶ Additionally, the court considered an amicus brief filed by several leading medical organizations, including the American Academy of Pediatrics, the American Association of Child & Adolescent Psychiatry, and the American Medical Association.¹⁵⁷ By relying on these scientific authorities, the court concluded that "the meaning of 'sex' in Title IX includes 'gender

the transgender student have intervened and are continuing to litigate the case. See *Doe v. Bd. of Educ. of the Highland Local Sch. Dist.*, Case No. 2:16-cv-524, 2017 WL 3588727, at *1 (S.D. Ohio Aug. 21, 2017).

151. See *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017) (affirming a preliminary injunction requiring the school district to treat a transgender boy like other male students); Joint Notice of Settlement, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 2:16-cv-00943-PP at 1 (E.D. Wis. Dec. 27, 2017).

152. *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 708 (D. Md. 2018).

153. *Id.* at 713–14 (citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–82 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

154. *Id.* at 717–18. (finding for the plaintiff additionally on an Equal Protection claim under the Fourteenth Amendment).

155. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, Case No. 3:17-cv-739, 2018 WL 3583843, at *25 (M.D. Fla. July 26, 2018).

156. *Id.* at *2.

157. *Id.* at *2 n.14.

identity’ for the purposes of its application to transgender students.”¹⁵⁸

The court’s approach in *Adams ex rel. Kasper* demonstrates how scientific and medical authorities can help courts better understanding how to interpret and apply antidiscrimination law. If these authorities are appropriate to consider in the context of education antidiscrimination law, as the next Section explains, they are even more relevant in healthcare antidiscrimination law.

C. DEFINING SEX IN THE AFFORDABLE CARE ACT

The ACA incorporates its prohibitions on sex discrimination from Title IX and provides no specific definition of sex or gender.¹⁵⁹ It references sex in several provisions, including the sections establishing an Office of Women’s Health¹⁶⁰ and mandating data collection to measure health disparities by sex.¹⁶¹ The nondiscrimination provision of the law, Pub. L. No. 111-148, Section 1557 (2010), codified at 42 U.S.C. § 18116 (hereinafter Section 1557), prohibits discrimination on the basis of sex by incorporating the protected grounds described in Title IX:

[A]n individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . 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 (or amendments).¹⁶²

The provision of Title IX cited in Section 1557 prohibits discrimination “on the basis of sex,” but similarly, does not define what sex means.¹⁶³

1. HHS’s Interpretation of Section 1557

In 2016, the Department of Health and Human Services’ (HHS) Office of Civil Rights (OCR) promulgated regulations interpreting the nondiscrimination section of the ACA to protect transgender people by defining “on the basis of sex” to include

158. *Id.* at *23.

159. *See* Patient Protection and Affordable Care Act (ACA) § 1557, Pub. L. No. 111-148, 124 Stat. 119 (2010).

160. *See id.* §§ 229, 310A, 713, 925, 1011.

161. *See id.* § 3101.

162. *Id.* § 1557.

163. 20 U.S.C. § 1681(a) (2012).

“gender identity.”¹⁶⁴ OCR defined gender identity to mean:

[A]n individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth. The way an individual expresses gender identity is frequently called gender expression, and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth.¹⁶⁵

OCR justified including gender identity as a protected ground encompassed by the phrase “on the basis of sex” by citing interpretations of sex discrimination by federal agencies¹⁶⁶ and courts.¹⁶⁷ Commenters suggested that OCR expressly include “gender expression” and “transgender status” in the definition of “on the basis of sex,” but OCR noted that it “encompass[es] these bases in the definition of ‘gender identity.’”¹⁶⁸ Other commenters opined that HHS’s definition was contrary to “Congressional intent to ban sex discrimination . . . based only on the biological classifications of males and females, not gender identity.”¹⁶⁹ Rejecting this argument, OCR cited *Price Waterhouse*: “Courts after *Price Waterhouse* interpret Title VII’s protections against discrimination on the basis of sex as encompassing not only ‘sex,’ or biological differences between the sexes, but also ‘gender’ and its manifestations.”¹⁷⁰

Although OCR found the ACA’s statutory definition of “on the basis of sex” to protect on the basis of gender identity, its reasoning demonstrates that it considers sex to refer to “biological differences between the sexes.”¹⁷¹ The preamble distinguishes conceptually between gender identity and biological sex without defining the term sex. OCR’s description of sex is contrasted by its expansive view of gender identity, “which may be male, female, neither, or a combination of male and female.”¹⁷²

164. 45 C.F.R. § 92.4 (2016).

165. *Id.*

166. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,387 n.56 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (citing regulations, opinion letters, and statements by the Office of Personnel Management, Department of Labor, Department of Justice, and Department of Education).

167. *Id.* at 31,387 n.58 (citing *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415 (D. Minn. Mar. 16, 2015) and cases interpreting Title VII).

168. *Id.* at 31,388.

169. *Id.*

170. *Id.*

171. *Id.*

172. 45 C.F.R. § 92.4 (2016).

These regulations effectively prohibit any “health program or activity”¹⁷³ from discriminating against patients on the basis of gender identity, including transgender and nonbinary people. HHS is currently considering repealing these regulations, but has not yet done so.¹⁷⁴

2. Judicial Interpretations of Section 1557

Few courts have considered whether Section 1557 applies to transgender plaintiffs.¹⁷⁵ The two cases described in this Subsection capture two types of approaches taken by federal courts.¹⁷⁶ Although these decisions will likely become irrelevant if the

173. 42 U.S.C. § 18116(a) (2012).

174. See Status Report at 1, *Franciscan All., Inc. v. Azar*, No. 7:16-cv-00108 (N.D. Tex. Feb. 13, 2018).

175. Legal scholars have argued for interpretations of Section 1557 that provide a cause of action for transgender plaintiffs, but these have yet to be taken up by any court. See Fore, *supra* note 38, at 244 (identifying legal theories under the ACA to protect transgender people from discrimination); Khan, *supra* note 38, at 411 (arguing that securing health benefits for transgender people requires expanding the notion of what services are deemed medically necessary and, therefore, covered by health insurance).

176. Most federal courts that have considered the issue have found that ACA allows transgender plaintiffs to bring claims of sex discrimination. See, e.g., *Tovar v. Essentia Health*, Civil No. 16-100 (DWF/LIB), 2018 WL 4516949, at *7 (D. Minn. Sept. 20, 2018) (finding that transgender plaintiff stated a claim for sex discrimination under the ACA); *Boyden v. Conlin*, No. 3:17-cv-264-wmc, 2018 WL 4473347, at *1 (W.D. Wis. Sept. 18, 2018) (allowing transgender plaintiffs’ ACA sex discrimination claim to proceed to trial); *Flack v. Wis. Dep’t of Health Servs.*, 18-cv-309-wmc, 2018 WL 3574875, at *15 (W.D. Wis. July 25, 2018) (granting plaintiffs’ request for a preliminary injunction against Wisconsin because the state’s Medicaid ban on transgender-related procedures likely violates the ACA); *Prescott v. Rady Children’s Hosp.*, 265 F. Supp. 1090, 1099–1100 (S.D. Cal. 2017) (denying defendant’s motion to dismiss sex discrimination claims brought by a transgender plaintiff under the ACA); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015) (same). A minority of courts have disagreed. See, e.g., *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016) (finding that the ACA did not permit transgender plaintiff to bring a sex discrimination claim).

Trump administration repeals the existing regulations interpreting Section 1557,¹⁷⁷ which it plans to do,¹⁷⁸ they present two conflicting interpretations of sex in Section 1557.

a. *Franciscan Alliance v. Burwell*

On December 31, 2016, a federal court granted a preliminary injunction that blocked OCR's definition of gender identity.¹⁷⁹ Judge Reed O'Connor found that the regulation violated the Administrative Procedure Act by contradicting existing law and that the regulation likely violated the Religious Freedom Restoration Act.¹⁸⁰ *Franciscan Alliance*, a privately-owned Catholic healthcare provider, and the Christian Medical & Dental Society brought the action, claiming that the regulation inappropriately requires them to provide transition-related and abortion-related services.¹⁸¹ Eight states that have categorical exclusions for gender-transition procedures in their state health programs joined the suit.¹⁸²

177. Transgender rights activists have expressed concerns that the Trump administration would repeal the regulations. *See, e.g.*, Oxiris Barbot & Laura E. Durso, *Promoting a Policy and Research Agenda to Protect Lesbian, Gay, Bisexual, and Transgender Health in the New Political Era*, 4 *LGBT HEALTH* 241, 241 (2017); Gilbert Gonzales & Tara McKay, *What an Emerging Trump Administration Means for Lesbian, Gay, Bisexual, and Transgender Health*, 1 *HEALTH EQUITY* 83, 83 (2017); William V. Padula & Kellan Baker, *Coverage for Gender-Affirming Care: Making Health Insurance Work for Transgender Americans*, 4 *LGBT HEALTH* 244, 245 (2017); Shefali Luthra, *Transgender Healthcare Targeted in Crusade to Undo ACA*, *KAISER HEALTH NEWS* (July 13, 2017), <https://khn.org/news/transgender-health-care-targeted-in-crusade-to-undo-aca>. These concerns appear to be well-founded because the administration has taken other notable anti-transgender actions. *See, e.g.*, Ann E. Marimow, *Federal Judge Says Trump Administration Can't Stop Funding Sex-Reassignment Surgery for Military Members*, *WASH. POST* (Nov. 21, 2017), https://www.washingtonpost.com/local/public-safety/a-second-judge-blocks-trump-administrations-proposed-transgender-military-ban/2017/11/21/d91f65e4-cee1-11e7-81bc-c55a220c8cbe_story.html.

178. Status Report at 1, *Franciscan All., Inc., v. Price*, No. 7:16-cv-00108 (N.D. Tex. Dec. 15, 2017) (stating that HHS is revisiting the regulation and is in the process of drafting a proposed rule to change the existing regulation). If the Trump administration decides to rescind the existing regulations, that decision will quite likely be subject to legal challenge. The 2016 regulations went through a full notice and comment process, so HHS will need to adequately explain why it has completely reversed course a year later.

179. *See Franciscan All.*, 227 F. Supp. 3d at 670.

180. *Id.*

181. *Id.* at 672–75.

182. Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Texas, and Wisconsin are plaintiffs in this action. *Id.* at 670 n.3.

Analyzing Section 1557 under *Chevron*, the court determined whether the HHS regulations were entitled to deference.¹⁸³ *Chevron* requires courts to defer to agency interpretations of ambiguous statutes through a two-step analysis.¹⁸⁴ First, courts must determine whether the statute in question is clear.¹⁸⁵ If the statute is unambiguous, the court must enforce the statute's plain meaning.¹⁸⁶ If the statute is ambiguous, the court proceeds to step two and defers to the administrative agency's interpretation of the statute if it is permissible.¹⁸⁷ At *Chevron* step one, the *Franciscan Alliance* court focused on the differences between sex and gender to determine that Congress unambiguously meant to prohibit discrimination only on the basis of biological sex.¹⁸⁸ The court relied on its own Title IX precedent to conclude that "the meaning of sex in Title IX unambiguously refers to the biological and anatomical differences between male and female students as determined at their birth."¹⁸⁹ It also found that the text of Title IX supports a binary understanding of sex because Title IX contains language referring to "students of one sex," "both sexes," and "students of the other sex."¹⁹⁰

Turning to the intent of Congress, the court noted that when Title IX was enacted "the term 'sex' was commonly understood to refer to the biological differences between males and females."¹⁹¹ It supported this reading of Congressional intent by pointing out the origins of the term "gender identity" as a concept distinct from biological sex.¹⁹² It quoted transgender activist Virginia Prince, who coined the term transgender, as stating "I, at

183. *Id.* at 685.

184. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Franciscan All.*, 227 F. Supp. 3d at 685–87.

189. *Id.* at 687 (internal quotation omitted).

190. *Id.* (citing 20 U.S.C. § 1681).

191. *Id.* at 688 (citing *Sex*, AMERICAN HERITAGE DICTIONARY (1976); *Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971); *Sex*, OXFORD ENGLISH DICTIONARY (9th ed. 1961)). Contrary to the court's assertion, only one of the three dictionaries cited by the court actually includes a binary definition of sex. See OXFORD ENGLISH DICTIONARY (9th ed. 1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.")

192. *Id.*

least, know the difference between sex and gender.”¹⁹³ It concluded that Title IX prohibited sex discrimination “on the basis of the biological differences between males and females.”¹⁹⁴ The court’s logic here relied on two points: sex means biological sex, and biological sex is exclusively determined by assignment at birth. Sex discrimination under Title IX, and therefore the ACA, cannot protect people from discrimination on the basis of gender identity because Congress understood that gender identity and sex are different. To illustrate this point, the court points to two other federal statutes that explicitly refer to gender identity: the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act and the 2013 amendments to the Violence Against Women Act.¹⁹⁵ The Hate Crimes Prevention Act criminalizes violence motivated by “gender identity,”¹⁹⁶ while the Violence Against Women Act amendments updated the statute to address both sex and gender identity.¹⁹⁷

The Justice Department, defending the regulation, relied on the stereotyping theory of sex discrimination established under Title VII in *Price Waterhouse*, arguing that discrimination on the basis of sex encompasses gender identity.¹⁹⁸ OCR included this argument in the preamble to the final rule at issue.¹⁹⁹ The Court distinguished *Price Waterhouse* by noting that the ACA only incorporated Title IX, not Title VII, and that even in the *Price Waterhouse* decision, the Supreme Court acknowledged “the binary nature of sex.”²⁰⁰

After Judge O’Connor issued a preliminary injunction against the regulation, the Justice Department, under the leadership of a new Attorney General, requested that the Court remand the case to HHS to allow the Agency to reconsider the final rule.²⁰¹ The Court granted the request, staying the proceedings

193. *Id.* at 688 n.25 (citing Virginia Prince, *Change of Sex or Gender*, 10 *TRANVESTIA* 53, 60 (1969)).

194. *Id.* at 688.

195. *Id.* at 689.

196. 18 U.S.C. § 249(a)(2)(A) (2012).

197. 42 U.S.C. § 13925(b)(13)(A) (2012).

198. *Franciscan All.*, 227 F. Supp. 3d at 689 n.28.

199. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,387 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

200. *Franciscan All.*, 227 F. Supp. 3d at 689 n.28.

201. *Franciscan All., Inc. v. Price*, No. 7:16-cv-00108-O, 2017 WL 3616652, at *3 (N.D. Tex. July 10, 2017).

and remanding the issue to HHS so it could “reassess the reasonableness, necessity, and efficacy” of the challenged aspects of the final rule.²⁰²

b. *Rumble v. Fairview Health Services*

Before OCR promulgated its regulations interpreting Section 1557, a federal court agreed with its approach in *Rumble v. Fairview Health Services*, finding that the ACA protected transgender plaintiffs on a theory of sex stereotyping under Title IX.²⁰³ Denying a motion to dismiss, the court found that a transgender plaintiff pleaded sufficient facts to allege an intent to discriminate because “the harassment was motivated by either [the plaintiff’s] gender or failure to conform with gender stereotypes.”²⁰⁴ In this case, the plaintiff experienced discrimination by hospital staff and an emergency room physician who conducted a painful and unnecessary examination of the plaintiff’s genitals.²⁰⁵ In addition, the plaintiff’s insurer initially denied the claim for this hospital visit and the plaintiff received a bill stating: “THE DIAGNOSIS IS INCONSISTENT WITH THE PATIENT’S GENDER.”²⁰⁶ In light of the *Franciscan Alliance* decision and the potential reconsideration of OCR’s regulation, the *Rumble* court stayed the litigation in January 2017 without reconsidering the merits of the case.²⁰⁷ The case settled in June 2017.²⁰⁸

The *Rumble* court’s reasoning provides a useful explanation of why courts should interpret Section 1557 as a freestanding healthcare antidiscrimination law, not merely as an application of other antidiscrimination laws to a new context. The court found that Section 1557 created “a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff’s protected class.”²⁰⁹ When determining what evidentiary and causation standards to apply to *Rumble*’s

202. *Id.* at *5.

203. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015).

204. *Id.* at *17 (quoting *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011)).

205. *Id.* at *16.

206. *Id.* at *18.

207. *See Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2017 WL 401940, at *4 (D. Minn. Jan. 30, 2017).

208. *See Order Dismissing Case, Rumble v. Fairview Health Servs.*, No. 14-cv-02037 (D. Minn. June 26, 2017).

209. *See Rumble*, 2015 WL 1197415, at *11, *11 n.6.

case, the court noted that the various statutes incorporated by Section 1557 each have different enforcement mechanisms.²¹⁰ If, for example, the court applied Title IX standards to sex discrimination claims under Section 1557 but applied Title VI standards to a race claim, it would “lead to an illogical result.”²¹¹ If different standards applied, “then courts would have no guidance about what standard to apply for a Section 1557 plaintiff bringing an intersectional discrimination claim.”²¹² Intersectional claims arise when a plaintiff alleges discrimination because of at least two protected traits. Black women plaintiffs, for example, experience particular forms of discrimination because of the intersection of their race and gender.²¹³ When interpreting Section 1557, courts can avoid these inconsistencies by recognizing that the statute created a new healthcare-specific antidiscrimination cause of action.

II. INTERPRETING SEX DISCRIMINATION IN SECTION 1557

This Part considers how Section 1557’s prohibition on sex discrimination applies to transgender, intersex, and nonbinary people. By analyzing Section 1557’s definition of sex using tools of statutory interpretation, it provides a framework for courts to determine that Section 1557 unambiguously prohibits discrimination against sexual minorities. Following a traditional framework of statutory interpretation, Section A begins with the statute’s text. It critiques the definition of sex proposed by the *Franciscan Alliance* court and reveals how its definition relies on assumptions about human sexuality instead of medical science. It proposes a characteristics-based definition of sex that reflects the ordinary and scientific meanings of sex. Section B then explains how this definition is appropriate for the ACA’s healthcare context. Section C compares Section 1557 with other federal statutes that contain similar language and explains why Section 1557 may have a definition of sex independent of other federal civil rights laws.

210. *Id.* at *11.

211. *Id.*

212. *Id.* at *12.

213. *Id.* at *12 n.7 (citing Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1791 (1993)).

A. TEXT

This Section critiques a common misunderstanding of sex discrimination as exemplified by the *Franciscan Alliance* court's interpretation of the Section 1557. The *Franciscan Alliance* court defined sex by assignment at birth.²¹⁴ Under this interpretation, sex can only be defined at birth and can never be changed. This misunderstanding relies on historical assumptions about biological sex and fails to acknowledge contemporary medical science.²¹⁵ Because the Trump administration's interpretation of Section 1557 will likely mirror the *Franciscan Alliance* court's, this Section explains why the reasoning of *Franciscan Alliance* misinterprets the plain meaning of sex.²¹⁶ Instead of defining sex exclusively by assignment at birth, this Section explains why Section 1557 defines sex by the variety of biological sex characteristics detailed in Section I.A.

1. Sex Defined by Assignment at Birth

The *Franciscan Alliance* court held that sex in Section 1557 unambiguously refers only to a person's sex as assigned at

214. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016).

215. For another example of this misunderstanding of sex, see Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POLY 309 (2018). Anderson first critiques trans-inclusive policies as "prolonging gender dysphoria," and argues that such policies are merely trying to "indoctrinate our nation's children." *Id.* at 318. He cites a supposed medical expert who says that most children with gender dysphoria "will revert back to a gender identity consistent with their sex." *Id.* at 319. Embracing the idea of diverse gender identities as disorders, he concludes that differentiating people based on biological sex is not discrimination, but reasonable and sound policy. *Id.* at 350. Unlike racial discrimination, he argues, gender identity discrimination is not harmful at all. *Id.* at 346–47. Undergirding his arguments is the assumption that biological sex is an immutable truth that can be determined by a physician at birth. However, as contemporary medical science demonstrates, humans have a variety of sex characteristics that may or may not align with an exclusively male or female biological sex. His scathing criticism of transgender rights ignores the reality that transgender people who have their gender identity affirmed generally lead happier, healthier, and more productive lives than those who have their identities denied. *See supra* notes 18–23 and accompanying text.

216. At the time of this Note's submission, HHS has not yet released its proposed rule interpreting Section 1557, but HHS has hinted in court filings that it plans to codify the *Franciscan Alliance* interpretation of sex in its proposed rule. *See* Status Update at 1–2, *Franciscan All., Inc. v. Azar*, No. 7:16-cv-00108 (N.D. Tex. Feb. 13, 2018); Status Update at 1–2, *Franciscan All., Inc. v. Price*, No. 7:16-cv-00108 (N.D. Tex. Aug. 4, 2017).

birth.²¹⁷ Because Title IX was enacted in 1972, the court considers the ordinary meaning of sex at the time the statute was enacted.²¹⁸ However, the court reaches an inappropriate definition of sex for the ACA for two reasons. First, courts should look to the enactment date of the ACA, not Title IX, to determine the ordinary meaning of sex at the time of the statute's enactment. Second, even if the court appropriately considered these definitions, it did not adhere to those definitions by assuming that biological sex is accurately defined at birth.

As a general principle of statutory interpretation, courts attempting to define a term in the statute look to the ordinary meaning of the term at the time Congress passed the statute.²¹⁹ However, in Section 1557, this principle needs to be applied somewhat differently because the statute incorporates definitions from four other statutes enacted at different times. None of the cases cited in *Franciscan Alliance* apply this principle to statutes that incorporate language from different statutes.²²⁰ To apply this principle to Section 1557, the court would need to look to definitions from 1964, 1972, 1973, and 1975 because the statute incorporates definitions from four other laws.²²¹ If courts must look to the definition from the time these other statutes were enacted or later amended, a court would need to use several dictionaries with potentially conflicting definitions.²²² Instead,

217. *Franciscan All.*, 227 F. Supp. 3d at 687.

218. *Id.* at 687–88 (citing *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994); *Baker Botts L.L.P. v. ASARCO L.L.C.*, 135 S. Ct. 2158, 2165 n.2 (2015)).

219. *See, e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566–68 (2012) (looking to dictionary definitions of interpreter from 1978, when the word was added to the statute in question); *Carcieri*, 555 U.S. at 388 (looking to definitions of now from 1934, when Congress enacted the statute in question); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788, 824–26 (2018) (noting that at least a few courts look to the ordinary meaning of the time of the statute's enactment).

220. *See Baker Botts*, 135 S. Ct. at 2165 n.2 (interpreting terms added to the Bankruptcy Code in 1934, 11 U.S.C. § 327(a)); *Carcieri*, 555 U.S. at 388 (interpreting terms contained in the Indian Reorganization Act of 1934, 25 U.S.C. §§ 465, 479); *MCI Telecomms. Corp.*, 512 U.S. at 228 (interpreting terms contained in the Communications Act of 1934, 27 U.S.C. § 203).

221. *See* 42 U.S.C. § 18116(a) (2012) (incorporating Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-4a; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88; the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–07; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794).

222. *Cf. Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *11–12 (D. Minn. Mar. 16, 2015) (noting that applying different

the court should simply look to the ordinary meaning of sex at the time the ACA was adopted in 2011.

Even if the *Franciscan Alliance* court correctly looked to definitions of sex from 1972, it incorrectly assumes that sex is accurately defined at birth. Each dictionary defines sex as a classification based on an organism's reproductive functions.²²³ None of these dictionaries define sex as biological differences determined at birth, the court's own definition.²²⁴ No dictionary definition from 1972 supports the conclusion that biological sex is determined exclusively at birth.

The only authorities the court cites for its definition of sex are two district court opinions.²²⁵ One of those opinions was written by the Judge O'Connor a few months prior to his decision in *Franciscan Alliance*.²²⁶ The other, a decision from the Western District of Pennsylvania, claims that "[m]any courts have defined the term 'sex' . . . as the biological sex assigned to a person at birth."²²⁷

However, this court only cited language from a single opinion, the Supreme Court's *Frontiero v. Richardson*, to support this proposition. In *Frontiero*, the Court wrote that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."²²⁸ Of course, the phrase "the accident of birth"²²⁹ does not endorse the idea that sex is accurately determined at birth. Read in context, it merely gives one reason why sex discrimination is unjust.²³⁰

Given the reality of how physicians assign sex at birth in the United States, there is no good reason for sex assignment at birth to be given any legal weight. Sex assignment at birth often

legal standards to each cause of action under Section 1557 would create conflicting results).

223. See *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 688 n.24 (N.D. Tex. 2016) (citing *Sex*, AMERICAN HERITAGE DICTIONARY (1976); *Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971); *Sex*, OXFORD ENGLISH DICTIONARY (9th ed. 1961)).

224. *Id.*

225. *Id.* at 687 (citing *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015)).

226. See *Texas*, 201 F. Supp. 3d at 833.

227. *Johnston*, 97 F. Supp. 3d at 670.

228. 411 U.S. 677, 686 (1973).

229. *Id.*

230. *Id.* at 686–87 ("[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class . . . to inferior legal status.").

ignores complexities in an infant's genetic, gonadal, morphological, and psychological characteristics.²³¹ Sex is typically determined at birth based solely on the size of an infant's genitalia.²³² The experiences of intersex, nonbinary, and transgender people who often spend decades attempting to correct an inappropriate sex determination made at birth demonstrate how arbitrary birth sex assignment is.²³³

In addition to giving undue weight to sex determinations made at birth, the *Franciscan Alliance* definition of sex leads to an absurd result by making it impossible for transgender, intersex, or nonbinary people to be discriminated against on the basis of sex. If sex only refers to a person's sex as assigned at birth, then transgender men who were assigned as "female" at birth are in fact "women" for the purposes of the statute. In that case, how could a physician discriminate against a transgender man?²³⁴

To understand the absurdity of the *Franciscan Alliance* definition of sex discrimination, consider applying it to the case of Jakob Rumble, the transgender man who sued his healthcare provider for sex discrimination under Section 1557.²³⁵ After arriving at a hospital emergency department and presenting with a 104 degree fever, a physician treated Mr. Rumble in a hostile and aggressive manner, made anti-trans comments, and subjected him to a painful and unnecessary genital exam.²³⁶ After being admitted to the hospital, another physician examined Mr. Rumble's genitals and proceeded to use the same glove when examining his eyes and mouth, which caused sores to develop on

231. See *supra* notes 38–46 and accompanying text.

232. See *supra* note 46.

233. See, e.g., DAVIS, *supra* note 74, at 3–5. Davis tells her personal story about how she received a sex assignment at birth that did not adequately reflect her intersex characteristics. Her medical providers had lied to her and her parents for years until she discovered the truth at age nineteen.

234. The *Franciscan Alliance* court would likely argue that sex discrimination is discrimination "against women because they are women and against men because they are men." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that a transgender person was not protected by Title VII). *But see* *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (criticizing the statement about sex discrimination being discrimination "against women because they are women and against men because they are men" as an unhelpful truism).

235. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *1–7 (D. Minn. Mar. 16, 2015).

236. *Id.* at *4.

his face.²³⁷ In these scenarios, both physicians treated Mr. Rumble differently than they would treat cisgender patients and they treated him negatively because he was transgender. The only way this treatment could be considered sex discrimination under the *Franciscan Alliance* definition would be if they treated him in this manner because he was “female.” But, of course, the physicians did not mistreat Mr. Rumble because he was female—they did so because he was a transgender male.

The *Franciscan Alliance* interpretation of sex discrimination does not fit within the structure of Section 1557 because it precludes an entire class of people from being discriminated against on the basis of sex. Section 1557 prohibits discrimination on the basis of race, sex, age, and disability by incorporating protected classes from other antidiscrimination laws.²³⁸ Although disability discrimination is limited to people who meet the definition described in the Rehabilitation Act of 1973,²³⁹ none of the other forms of discrimination prohibited by Section 1557 exclude a class of people. Race discrimination, as defined in Title VI of the Civil Rights Act,²⁴⁰ and age discrimination, as defined in the Age Discrimination Act of 1975²⁴¹ prohibit discrimination against people of all ages and races. Notably, Congress chose to incorporate the Age Discrimination Act and not the Age Discrimination in Employment Act, which only prohibits discrimination against people over the age of forty.²⁴² This suggests that Congress sought to protect people of all ages from discrimination. Why would Congress then choose not to protect people of all sexes? The *Franciscan Alliance* interpretation of Section 1557 would only prohibit sex-based discrimination against cisgender people, but protect everyone from racial and age-based discrimination.²⁴³

Similarly, other areas of antidiscrimination law prohibit discrimination against anyone on the basis of protected characteristics. For example, Title VII protects everyone from race discrimination because everyone has a race.²⁴⁴ Although anti-white

237. *Id.* at *6.

238. 42 U.S.C. § 18116(a) (2012).

239. 29 U.S.C. § 794(a) (2016).

240. 42 U.S.C. § 2000d (2012).

241. 42 U.S.C. § 6101 (2012).

242. 29 U.S.C. § 631(a) (2012); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004) (holding that the Age Discrimination in Employment Act only prohibits discrimination against older employees).

243. *See* 42 U.S.C. § 18116(a) (2012).

244. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976).

discrimination was not Congress's primary concern when it passed Title VII, the Supreme Court has made clear that Title VII applies to everyone regardless of race.²⁴⁵ Similarly, Title VII's prohibition against discrimination on the basis of religion protects the religious and non-religious alike.²⁴⁶ So too should sex discrimination in the ACA be interpreted to protect both cis-gender and non-cisgender people.

The *Franciscan Alliance* definition of sex discrimination leads to absurd results because, in contrast with antidiscrimination law generally and the rest of Section 1557, it permits sex-based discrimination against an entire class of people. Even if a court were to determine that the ACA unambiguously defines sex as assigned at birth, the absurdity doctrine should prevent a court from reaching the *Franciscan Alliance* definition of sex. The absurdity doctrine is applied when a clear statutory meaning would produce otherwise absurd results.²⁴⁷ Here, the *Franciscan Alliance* definition of sex would make it impossible for an entire group to be discriminated against on the basis of sex. That result runs contrary to nearly all other areas of anti-discrimination law.

2. Sex Defined by Characteristics

The ordinary meaning of sex in Section 1557 does not refer to sex assigned at birth, but to the many physiological and psychological characteristics that determine sex. Contemporary dictionaries define sex as the classification of a species, usually between men and women, based on reproductive organs or

245. *Id.* at 289.

246. *See* *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (citing *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 589–90 (1989) (holding that the First Amendment protects the irreligious as well as those who practice religion)).

247. *See* *Demarest v. Manspeaker*, 498 U.S. 184, 190–91 (1991); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388–89 (2003).

function.²⁴⁸ Similarly, a basic medical definition of sex is “biological qualities that distinguish between male and female.”²⁴⁹ These biological qualities include a person’s chromosomal, gonadal, morphological, and hormonal characteristics.²⁵⁰ In addition to these physiological factors is a person’s internal sense of sex,²⁵¹ also referred to as gender identity or “brain sex.” Each of these factors contributes to a person’s sex. Sex discrimination under Section 1557 occurs when a person is discriminated against because of any one of these characteristics.

This characteristics-based definition is flexible and may need to change as scientific understandings of sexual identities become more accurate. New characteristics may emerge as central to an individual’s sex. For example, recent scientific studies have demonstrated that some of these characteristics, once thought of as binary, are far more complicated.²⁵² Individual brains tend not to have a single sexual identity, and instead contain an array of masculine and feminine traits, or what one neuroscientist describes as an “intersex brain” with a mosaic of characteristics.²⁵³ Other legal protections for minorities have evolved

248. See, e.g., *Sex*, MERRIAM-WEBSTER (Aug. 31, 2018), <https://www.merriam-webster.com/dictionary/sex> (“[E]ither of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.”); *Sex*, OED ONLINE (July 2018), <http://www.oed.com/view/Entry/176989> (defined as “[e]ither of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions” and “[i]n extended use, esp[ecially] as the third sex” in referring to a “(notional) third division of humanity regarded as analogous to, or as falling between, the male and female sexes; spec[ifically] that consisting of: (a) eunuchs or transsexuals”); see also *supra* note 223 and accompanying text.

249. See Claude J. Migeon & Amy B. Wisniewski, *Sexual Differentiation: From Genes to Gender*, 50 HORMONE RES. 245, 245 (1998) (describing how a variety of sex characteristics determine a person’s sex).

250. *Id.*; see *supra* Part 1.A.

251. See Greenberg 2006, *supra* note 39, at 54; Migeon & Wisniewski, *supra* note 249, at 249; Kenneth J. Zucker, *Intersexuality and Gender Identity Differentiation*, 15 J. PEDIATRIC ADOLESCENT GYNECOLOGY 3, 4 (2002).

252. See Cordelia Fine et al., *Plasticity, Plasticity, Plasticity . . . and the Rigid Problem of Sex*, 17 TRENDS COGNITIVE SCI. 550, 550 (2013) (describing studies that demonstrate that maleness or femaleness is not “hardwired” in the human brain).

253. One study of human brains demonstrated that brains are far from sexually dimorphic, and that most people have brain characteristics that are on a continuum between male and female. Daphna Joel, *Genetic-Gonadal-Genitals Sex (3G-Sex) and the Misconception of Brain and Gender, or, Why 3G-Males and 3G-Females Have Intersex Brain and Intersex Gender*, 3 BIOLOGY SEX DIFFERENCES 1, 2 (2012); see also Daphna Joel & Anne Fausto-Sterling, *Beyond Sex Differences: New Approaches for Thinking About Variation in Brain Structure*

over time to recognize the existence of more minority groups.²⁵⁴ A characteristics-based interpretation of sex discrimination would do the same.

A characteristics-based interpretation of sex discrimination also applies to everyone, not only cisgender people, and it reflects the realities of discrimination experienced by sexual minorities. For example, in the case of Mr. Rumble, his physicians treated him differently than other patients and caused him harm because they did not think that his gender identity aligned with the external appearance of his genitalia.²⁵⁵ If Mr. Rumble could prove that he was mistreated because of his sex identity as a transgender male, and the complaint suggests that he could,²⁵⁶ his physician's conduct would have been actionable under a characteristics-based definition of sex.²⁵⁷

B. CONTEXT

A court could reach a characteristics-based definition sex simply by analyzing the statutory text and contemporary dictionaries, but the overall context of the statute bolsters the plain meaning analysis described in Section II.A. A general principle

and Function, 371 PHIL. TRANSACTIONS ROYAL SOC'Y B 1, 1 (2016) (“[H]uman brains are better described as belonging to a single heterogeneous population rather than two distinct populations.”).

254. Many laws in the United States that originally excluded minorities are now understood to recognize the dignity and humanity of those minorities. For example, women were once a minority excluded from the Constitution's original notion of “people.” See Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 17–18 (1988). In 1787, the Constitution did not apply to women. *Id.* Not until 1971 did the Supreme Court establish a jurisprudence that included women. *Id.* Similarly, gay, lesbian, and bisexual people have only recently been recognized by constitutional doctrine. Many states criminalized same-sex sexual behavior until the Supreme Court declared sodomy laws unconstitutional in 2003. See *Lawrence v. Texas*, 539 U.S. 558, 558 (2003). The Court affirmed the dignity of gay, lesbian, and bisexual people in its landmark decision declaring a constitutional right to marriage. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015). Transgender people have similarly been ignored by the laws of the United States. As more Americans begin to recognize the existence and humanity of transgender people, it is imperative that courts consider how the laws of the United States apply to transgender people. As the Court wrote in *Lawrence*, “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” 539 U.S. at 579.

255. See *supra* notes 235–36 and accompanying text.

256. See Compl. ¶¶ 39–60, *Rumble v. Fairview Health Servs.*, 14-cv-02037 (D. Minn. June 20, 2014).

257. See *Wong*, *supra* note 38, at 500 (noting that denial of healthcare services due to “failure to conform to stereotypical notions of masculinity or femininity” constitutes an actionable claim of discrimination).

of statutory interpretation requires courts to “read words in their context and with a view to their place in the overall statutory scheme.”²⁵⁸ When interpreting the ACA, which comprehensively reformed the healthcare system in the United States, the overall scheme and purpose of the statute are especially important.²⁵⁹

In the healthcare context, providers have a unique role in defining a person’s sexual identity. For a child born in a hospital in the United States, a physician defines the child’s sex based on the appearance of the child’s genitalia.²⁶⁰ Physicians also act as liaisons between a patient and healthcare services. Without physician approval, insurers will not agree to pay for a medical procedure, consultation, or medication.²⁶¹ Many people enlist the help of healthcare providers when managing a sexually transmitted disease, evaluating their fertility, and choosing a contraception strategy. Section 1557’s definition of sex should reflect the unique role of healthcare providers in defining and managing their patients’ sex and sexuality.

For transgender people, physicians are the gatekeepers to gender-affirmative care. For example, a transgender person seeking a hormone treatment must first find a physician willing to prescribe the treatment.²⁶² To get their insurer to pay for the treatment, they need a physician to approve the treatment and certify that it is medically necessary, which often requires a diagnosis of Gender Identity Disorder (GID).²⁶³ Many transgender activists and scholars challenge the use of this diagnosis as a prerequisite for gender-affirming care because it negatively affects people seeking affirmative care.²⁶⁴ These processes, however problematic, demonstrate how healthcare entities play a uniquely powerful role in the lives of transgender people.

258. *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015).

259. *See, e.g., id.* at 2496 (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”).

260. *See* FAUSTO-STERLING 2000, *supra* note 45, at 45–46.

261. *See* Kurzweil, *supra* note 36, at 217–19 (discussing the difficulties faced by transgender people in obtaining insurance coverage and approval).

262. *Id.*

263. *See* Silver, *supra* note 84, at 496; Romeo, *supra* note 83, at 724–25.

264. *See, e.g.,* Spade, *supra* note 83, at 35 (“I do not want to make trans rights dependent upon GID diagnoses, because such diagnoses are not accessible to many low income people; because I believe that the diagnostic and treatment processes for GID are regulatory and promote a regime of coercive binary gender; and because I believe that GID is still being misused by some mental health

A characteristics-based definition of sex makes sense in the medical context because physicians are in a unique position to determine a person's sex characteristics.²⁶⁵ Healthcare providers can learn about any of these traits through medical examinations and tests.²⁶⁶ In most other contexts, a person's hormonal, gonadal, or morphological sex remain private. In healthcare, by contrast, physicians can learn about these factors before the patient herself. For example, intersex scholar and sociologist Georgiann Davis writes about how she did not learn that she had an intersex trait until over a decade after her physicians had discovered it.²⁶⁷ Her physician had lied to her about her condition, telling her that she had a cancerous ovary that needed to be removed.²⁶⁸ However, after she personally reviewed her medical records, she realized that she had simply had internal undeveloped internal testes, an intersex trait that was unlikely to cause any health problems.²⁶⁹ In Ms. Davis's case, her physician learned about her intersex trait and made biased medical decisions because of that trait. Her story demonstrates how physicians have a unique opportunity to discriminate against sexual minorities because of their special knowledge of their patients' sex characteristics.

The special relationship that healthcare providers have with patients puts them in a uniquely powerful position to discriminate against patients on the basis of sex. Insurers also have ac-

practitioners as a basis for involuntary psychiatric treatment for gender transgressive people.”); Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1770 (2002) (“The main objection lodged by commentators against the ‘medically necessary’ designation is that it tends to reinforce an erroneous classification system acknowledging only two sexes.”); Romeo, *supra* note 83, at 732 (“Gender nonconforming people who do not articulate their experiences of gender in a manner that comports with the diagnostic criteria for GID are often refused hormone treatments, surgeries, or other gender-related healthcare.”).

265. See Greenberg 2006, *supra* note 39, at 52 (noting that sex is typically determined by a newborn's physician at birth).

266. For example, physicians can test the genetic make-up of a child. If a child's sex is ambiguous, many will refuse to assign a sex until they receive the results of this genetic test. As one mother of a girl with an intersex syndrome reported, a physician told her: “Your baby is all female on the inside, but we have to wait for the chromosomal tests.” KARKAZIS, *supra* note 48, at 108.

267. *Id.*

268. *Id.*

269. *Id.*

cess to this information because they can review a patient's medical record to make payment decisions.²⁷⁰ Unlike employers or educators, physicians and insurers can learn far more information about an individual's sex characteristics and use that information to discriminate. The unique context of healthcare supports a characteristics-based interpretation of sex in Section 1557. This definition acknowledges the unequal power dynamic between providers and patients, and offers protections for sexual minorities who are subject to discrimination by their providers or insurers.

C. SQUARING SECTION 1557 WITH OTHER FEDERAL LAWS

This Section compares the Section 1557's characteristics-based definition of sex with the definitions of sex in other federal laws: Title IX, Title VII, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, and the Violence Against Women Act. This Note does not argue that these other statutes do not protect sexual minorities from discrimination. Rather, it considers how courts and advocates can analyze the meaning of sex in the ACA independently from those laws. The *Rumble* court determined that Section 1557 creates a new cause of action with its own evidentiary and causation standards.²⁷¹ This Section builds on that analysis by explaining why other federal laws do not preclude a characteristics-based definition of sex discrimination in Section 1557.

1. Title VII and Title IX

A characteristics-based definition of sex in Section 1557 would not be precluded even if Title VII and Title IX are interpreted to contain a different definition of sex. Where Congress re-enacts a statute or incorporates a statute by reference, it only adopts settled judicial constructions where "the supposed judicial consensus [is] so broad and unquestioned that we must presume Congress knew of and endorsed it."²⁷² Title IX's applicability to transgender people was far from settled at the time the ACA was enacted in 2010. Before 2015, no federal court had considered the issue directly in the Title IX context²⁷³ and courts

270. See, e.g., Kurzweil, *supra* note 36, at 261 (noting that insurers frequently deny coverage for transition-related procedures).

271. See *supra* notes 209–11 and accompanying text.

272. *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005).

273. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (holding that Title IX "does not

interpreting Title VII had reached an array of different conclusions.²⁷⁴ Since 2015, most courts have found that transgender plaintiffs can bring sex discrimination claims under Title IX.²⁷⁵ The variety of judicial interpretations of the issue, and the lack of any Supreme Court decisions, demonstrate that Congress could not have adopted any particular judicial interpretation of Title IX in Section 1557.

Given the uncertainty of how Title VII and Title IX treat transgender people, the principle of *in pari materia* alone does not resolve the question of how Section 1557 applies to sexual minorities. *In pari materia* is the principle of statutory interpretation that similar statutory provisions found in comparable statutory schemes should be applied similarly.²⁷⁶ This presumption of statutory consistency has the greatest force when the terms are used in “the same act.”²⁷⁷ Congress is less likely to use terms consistently across different acts, especially when it passed those acts in different decades.²⁷⁸ Title VII and Title IX were passed decades before the ACA at a time when the medical

prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic”).

274. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572–73 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018) (holding that “claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory”); see also *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296–97 (W.D. Pa. 2017) (collecting cases).

275. See, e.g., *M.A.B.*, 286 F. Supp. 3d at 715; *Evancho*, 237 F. Supp. 3d at 296–97 (collecting cases); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016). *But see Texas v. United States*, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016) (interpreting the term “sex” under 34 C.F.R. § 106.33 and Title IX to mean “the biological and anatomical differences between male and female students as determined at their birth”).

276. See *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

277. See *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

278. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 130 (2d Cir. 2018) (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 936 (2013)).

understanding of sex characteristics was more limited.²⁷⁹ Further, neither Title VII nor Title IX address discrimination in the unique context of healthcare.²⁸⁰

Just because an identical term is used in similar statutory provisions does not mean that the term must have an identical meaning in each statute. For example, a “coal mine,” as defined by two separate provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1)–(2), has a different meaning depending on the context.²⁸¹ When Congress amended the Act in 1977, it retained an earlier definition for the purpose of determining eligibility for black lung benefits.²⁸² Despite similar definitions, courts have interpreted those definitions to have unique, context-dependent meanings.²⁸³ The amended Act, at § 802(h)(1), broadly defined a coal mine as including the mine itself and any facilities used in the extraction of minerals.²⁸⁴ By contrast, the black lung benefit mine definition, at § 802(h)(2), defines a mine more narrowly and restricts the definition of “mine” to areas geographically near the mining tunnels.²⁸⁵ Just as coal mines have independent, context-dependent definitions, so too might the term sex as used in Title VII, Title IX, and Section 1557.

Interpretations of Title VII and Title IX are not strong enough to override the plain meaning arguments, both textual and contextual, that support a characteristics-based definition of

279. See DAVIS, *supra* note 74, at 66–68 (describing the development of terminology to refer to people with intersex traits); FAUSTO-STERLING 2000, *supra* note 45, at 45–48 (describing the history of medical knowledge of intersex characteristics).

280. See *supra* Part II.B.

281. See 30 U.S.C. § 802(h)(1) (2012) (defining coal mines generally for the purposes of the Act); *id.* § 802(h)(2) (adopting a different definition of coal mine for the purpose of black lung benefits).

282. Black lung benefits provide “compensation to coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment, and to survivors of coal miners whose deaths are attributable to the disease” and provide “eligible miners with medical coverage for the treatment of lung diseases related to pneumoconiosis.” *Division of Coal Mine Workers’ Compensation (DCMWC)*, U.S. DEP’T LAB., <https://www.dol.gov/owcp/dcmwc> (last visited Oct. 12, 2018).

283. See, e.g., *U.S. Dep’t of Labor v. Ziegler Coal Co.*, 853 F.2d 529, 534 (7th Cir. 1988); *Herman v. Commonwealth Edison*, No. 98-C-3308, 1999 WL 350644, at *2 (N.D. Ill. May 21, 1999); see also Ann K. Wooster, Annotation, *What Is “Mine” Under Federal Mine Safety and Health Act of 1977 (30 U.S.C.A. § 802(h))*, 167 A.L.R. FED. 293 (2001).

284. 30 U.S.C. § 802(h)(1).

285. *Id.* § 802(h)(2).

sex in Section 1557. Given the unique context and structure of the ACA, a court may interpret the meaning of sex in Section 1557 in a manner independent of Title VII and Title IX.

2. Contemporaneous Statutes

Around the time that Congress passed the ACA, it passed two statutes that differentiated sex and gender. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA) criminalizes willfully causing bodily injury to another person because of that person's "actual or perceived . . . gender, sexual orientation, [or] gender identity."²⁸⁶ It defines gender identity as "actual or perceived gender-related characteristics."²⁸⁷ Similarly, the Violence Against Women Reauthorization Act (VAWRA) was passed in 2013, adding "gender identity" as a protected characteristic in the statute's nondiscrimination provision.²⁸⁸ The VAWRA amendment incorporated the definition of gender identity from the HCPA.²⁸⁹

The court in *Franciscan Alliance* argued that these statutes demonstrate how Congress understood the difference between sex and gender, and by not specifying "gender identity" in Section 1557, that it did not intend to prohibit discrimination on that basis.²⁹⁰ This interpretation could lead to strange results. For example, under the interpretation of the *Franciscan Alliance* court,²⁹¹ a transgender person who was violently attacked for being transgender could then be turned away by the hospital where they sought treatment for their injuries.²⁹² The attacker would be subject to prosecution under the HCPA, but the hospital could legally refuse treatment because it did not want to treat transgender patients.

286. 18 U.S.C. § 249(a)(2)(A) (2012).

287. *Id.* § 249(c)(4).

288. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 61 (codified as amended at 34 U.S.C. § 12291(b)(13)(A)).

289. 34 U.S.C. § 12291(b)(13)(A) (2017).

290. *See supra* Part I.C.2.a.

291. 227 F. Supp. 3d 660, 689 (N.D. Tex. 2016) (arguing that the HCPA indicates that Congress did not intend to protect transgender people from discrimination in the ACA).

292. This hypothetical assumes that the patient is not seeking emergency care. Other federal law prohibits hospitals that receive federal funding from turning away patients in need of emergency care. *See infra* note 339 and accompanying text.

The differentiation of sex and gender identity in the HCPA, and as adopted in the VAWRA, does not mean that the two classes are separate categories in all other acts passed by Congress. Congress often uses “both a belt and suspenders to achieve its objectives.”²⁹³ Gender identity is a sex characteristic, and so discrimination on the basis of sex includes discrimination on the basis of gender identity. Differentiating the two categories may simply be an example of duplicative language. Additionally, the HCPA and VAWRA are both criminal statutes. Under the rule of lenity, courts generally require that any ambiguities in a criminal statute be resolved in favor of the defendant.²⁹⁴ Accordingly, statutory language in criminal statutes may be more specific than a similar civil statute to ensure there is no ambiguity.

The relationship between sex and gender in Section 1557 is comparable to the relationship between national origin and ethnicity in Title VII.²⁹⁵ Although Title VII does not specify ethnicity as a protected trait, discrimination on the basis of ethnicity is actionable as a claim of national origin discrimination.²⁹⁶ “[A]s a legal matter,” the terms overlap.²⁹⁷ At least one other federal statute differentiates those traits.²⁹⁸ That fact did not preclude the Supreme Court from interpreting Title VII’s definition of national origin as inclusive of ethnicity. Similarly, Section 1557’s

293. See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting that redundant language in a federal maritime statute may reflect a “belt-and-suspenders caution”); *United States v. Bronstein*, 849 F.3d 1101, 1110 (D.C. Cir. 2017) (analyzing a statute prohibiting the use of firearms outside the Supreme Court, and noting the statute appears to use a belt-and-suspenders approach, including terms that may be redundant); *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 344 (7th Cir. 2017) (en banc) (arguing that sex also includes sexual orientation, and that the inclusion of both phrases in the HCPA simply indicates that Congress used “both a belt and suspenders to achieve its objectives”); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 176–77 (2012) (“Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.”).

294. See *United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J., plurality) (describing the rule of lenity).

295. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 579 (6th Cir. 2018).

296. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 605, 614 (1987) (Brennan, J. concurring).

297. *Id.*

298. See *Harris Funeral Homes*, 884 F.3d at 579 (citing 20 U.S.C. § 1092(f)(1)(F)(ii), which requires colleges that issue financial aid to report statistics about campus hate crimes).

definition of sex includes gender identity, even though Congress chose to differentiate the traits in other statutes.

The different purposes of the HCPA and the ACA also explain the divergence in language when describing sex and gender. The HCPA had a single goal: to protect minorities from hate crimes and provide recourse to victims of these crimes.²⁹⁹ By contrast, the ACA sought to reform the U.S. healthcare system, a notoriously complex and difficult task.³⁰⁰ The legislative history of the HCPA supports a reading of the statute that is focused on solving a single problem. The House Judiciary Committee's report on this legislation notes that transgender people have suffered from particularly violent hate crimes, which are "the product of extreme bias against gender nonconformity."³⁰¹ It also recognizes that local police "often lack training and familiarity with transgender people."³⁰² These findings suggest that Congress wanted to especially protect transgender people from hate crimes. By specifying gender identity as a protected trait, Congress did not suggest that sex and gender identity are separate concepts. Rather, it sought to ensure that the federal government could punish perpetrators of anti-transgender hate crimes. The plain text and unique context of Section 1557 require an interpretation of the statute that does not rely on these other civil rights laws.

D. DEFERRING TO HHS'S INTERPRETATION OF SECTION 1557

Because this Part reached a characteristics-based definition of sex discrimination using tools of statutory construction, a court could end its inquiry there and would not need to consider the purposes of the ACA. The arguments in this Part would allow a court to decide that Section 1557's prohibition on sex discrimination unambiguously protects people with transgender, intersex, and nonbinary identities. The question of whether sex discrimination claims by transgender plaintiffs are cognizable under Section 1557 can be answered by using the statute itself—no interpretation or regulatory deference is required. In fact, some federal district courts have agreed with this view, refusing to stay transgender plaintiffs' sex discrimination claims against

299. See 18 U.S.C. § 249 note (2016) (Findings) (describing how violence motivated by the victim's gender identity is a serious problem that Congress seeks to resolve with the statute).

300. See *infra* Part III.A for a discussion of the purposes of the ACA.

301. H.R. REP. NO. 111-86, at 11 (2009).

302. *Id.*

their health insurers in light of the *Franciscan Alliance* decision.³⁰³ The court decided that it could address the statutory question even if the Obama-era regulations were enjoined.³⁰⁴

However, HHS will likely issue regulations that contradict that unambiguous meaning.³⁰⁵ If those regulations are challenged, a court would analyze whether HHS exceeded its statutory authority under *Chevron*.³⁰⁶ *Chevron* requires courts to use “traditional tools of statutory construction,” like those used in this Part, to ascertain whether “Congress had an intention on the precise question at issue.”³⁰⁷ Therefore, a court could decide against that interpretation at *Chevron* step one. Part III supplements the statutory analysis that would be conducted at *Chevron* step one by explaining how Section 1557 fits into the framework of the ACA.

III. SEX DISCRIMINATION & THE ACA’S PURPOSE

The Supreme Court has found that the ACA signals a clear statutory purpose and, when interpreting the statute, it has attempted to further that purpose, even if the statutory text seems to contradict Congress’s objectives.³⁰⁸ If a court is not convinced that Section 1557’s definition of sex unambiguously applies to sexual minorities, under Supreme Court precedent, the purpose of the statute trumps any statutory ambiguity. This Part explains how a characteristics-based definition of sex is consistent with the ACA’s purpose.

303. See *Tovar v. Essentia Health*, Civil No. 16-100 (DWF/LIB), 2018 WL 4516949, at *7 (D. Minn. Sept. 20, 2018) (finding that transgender plaintiffs stated a claim for sex discrimination under Section 1557 and declining to stay the case in light of *Franciscan Alliance*); *Boyden v. Conlin*, No. 3:17-cv-264-wmc, 2018 WL 2191733, at *9 (W.D. Wis. May 11, 2018) (same).

304. *Id.* at 21. *But see* *North Dakota v. Burwell*, No. 3:16-cv-00386, at 2 (D.N.D. Aug. 24, 2017) (granting defendant’s motion to stay the litigation until HHS issues new regulations interpreting Section 1557).

305. See *supra* note 216; Status Update at 1–2, *Franciscan All., Inc. v. Azar*, No. 7:16-cv-00108 (N.D. Tex. Feb. 13, 2018) (noting that HHS is “reevaluating the reasonableness, necessity, and efficacy of [45 C.F.R. § 92]”).

306. Regulations promulgated through notice-and-comment rulemaking receive judicial deference under the *Chevron* standard. See *United States v. Mead Corp.*, 533 U.S. 218, 229–31, 230 n.11 (2001) (citing *Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001) (explaining how *Chevron* applies to situations where Congress would have intended a higher level of deference to agency interpretation, including when agencies promulgate regulations through notice-and-comment rulemaking)).

307. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

308. See *supra* notes 40–41 and accompanying text.

The ACA expanded coverage and prohibited price discrimination by health insurers, except in limited circumstances.³⁰⁹ Prior to the ACA, insurers would discriminate amongst their insureds by charging higher premiums to patients who had a higher risk of using medical services.³¹⁰ The law also sought to expand coverage and make health insurance more affordable.³¹¹ Excluding sexual minorities from the law's antidiscrimination provision runs counter to that purpose by restricting access to care. Section A provides a brief overview of the key goals of the ACA, and Section B explains how a characteristics-based definition of sex furthers those goals.

A. PURPOSES OF THE ACA

The purpose of the ACA is to expand healthcare coverage for all Americans and dramatically reduce the number of uninsured.³¹² Prior to the law's passage, approximately fifty million people in the United States were uninsured, but these uninsured people consumed more than \$100 billion in healthcare services annually.³¹³ Because most uninsured could not afford care, they accumulated debts they could never pay.³¹⁴ Healthcare providers did not absorb these debts, but passed them onto reliable payers: government and private insurance.³¹⁵ Insurers in turn passed those costs onto their subscribers, while governments passed them on to taxpayers.³¹⁶ Additionally, people without insurance lacked access to preventative care.³¹⁷ Without access to preventative care, diseases that could be treated easily, notably chronic conditions such as hypertension or diabetes, became worse over time for this population.³¹⁸ When they did receive care, it required "costly and extensive intervention[s]."³¹⁹

309. 42 U.S.C. § 300gg (2012); *King v. Burwell*, 135 S. Ct. 2480, 2486 (2015).

310. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 596–97 (2012) (Ginsburg, J., concurring in part and dissenting in part) (explaining how health insurers would discriminate against people with preexisting medical conditions by charging higher premiums or denying coverage).

311. *King*, 135 S. Ct. at 2485 (“The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market.”).

312. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 596.

313. *Id.* at 592.

314. *Id.* at 593.

315. *Id.*

316. *Id.*

317. *Id.* at 594.

318. *Id.*

319. *Id.*

Congress's solution to these problems in the individual health insurance market took a three-pronged approach. First, the ACA required insurers to issue policies to patients regardless of their health status or other demographic factors—the guaranteed issue requirement³²⁰—while also preventing insurers from charging higher premiums to certain populations.³²¹ Together, these requirements limit how insurers may discriminate in issuing policies or establishing insurance premiums.³²² Second, the ACA requires individuals to maintain insurance coverage or pay a tax penalty to the federal government—the coverage mandate.³²³ The mandate was necessary to increase the size of the insurance pool and ensure that healthy people, who seldom use healthcare services, paid insurance premiums.³²⁴ Including more healthy people in an insurance pool lowers premiums for all policy-holders.³²⁵ Third, the ACA grants tax credits and subsidies to make insurance premiums affordable for low-income people.³²⁶ To facilitate this new system of individual insurance, the ACA also required that states establish online health insurance exchanges that would make shopping for insurance easier.³²⁷ If a state chose not to establish an exchange, the federal government would provide an exchange that individuals in that state could use instead.³²⁸

The Supreme Court has held that each of these three reforms were necessary for the overall individual health insurance market to work as Congress intended.³²⁹ When the individual

320. 42 U.S.C. § 300gg-1(a) (2012); *King v. Burwell*, 135 S. Ct. 2480, 2486 (2015).

321. 42 U.S.C. § 300gg; *King*, 135 S. Ct. at 2486.

322. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 597 (Ginsberg, J., concurring in part and dissenting in part). The law allows insurers to discriminate when setting premiums in only limited ways. Premiums can be up to three times higher for older insureds than for younger insureds, tobacco users may be charged up to fifty percent more for premiums, and families can be charged more than individuals. Additionally, insurers can charge different premiums based on geographic areas. See 42 U.S.C. § 300gg(a)(4).

323. 26 U.S.C. § 5000A(a) (2012); see also *King*, 135 S. Ct. at 2486. In 2017, Congress effectively repealed the individual mandate by reducing the tax penalties owed by people without insurance to zero. See Pub. L. No. 115-97 § 11081(a), 131 Stat. 2032 (to be codified at 26 U.S.C. § 5000A (2018)).

324. See 42 U.S.C. § 18091(2)(I); *King*, 135 S. Ct. at 2486–87.

325. See *King*, 135 S. Ct. at 2486–87.

326. 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii); 42 U.S.C. §§ 18081–82; *King*, 135 S. Ct. at 2487.

327. 42 U.S.C. § 18031(b)(1); *King*, 135 S. Ct. at 2487.

328. 42 U.S.C. § 18041(c)(1); *King*, 135 S. Ct. at 2487.

329. *King*, 135 S. Ct. at 2493.

mandate was challenged as an unconstitutional exercise of Congressional power, the Court found that it was constitutional because it functioned as a tax.³³⁰ In 2015, the tax credits and subsidies were challenged.³³¹ Petitioners in *King v. Burwell* argued that the tax credits were only available to people who had purchased plans on individual insurance exchanges established by the states and not to individuals who purchased plans on the federal exchange.³³² The text of the ACA specifies that the subsidies would only be available to individuals purchasing insurance on “an Exchange established by the State.”³³³

Despite the apparent plain meaning of this provision, the Court held that this reading was contrary to overall structure of the ACA.³³⁴ Looking at the whole context of the statute, the Court found that Congress could not have possibly intended to eliminate one of the three central pillars of insurance reform with this single provision: “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.”³³⁵ The Court chose not to adhere strictly to the text of the statute because doing so would have created a result counter to ACA’s overall design.³³⁶ Additionally, the Court noted that the ACA “contains more than a few examples of inartful drafting” due to the legislative procedures used to write the law.³³⁷

B. FURTHERING THE ACA’S PURPOSE BY PREVENTING SEX DISCRIMINATION

Without Section 1557, providers could refuse to serve transgender, intersex, and nonbinary people. Physicians could refuse to provide routine preventative services simply because the patient is transgender. In fact, many transgender people report such experiences.³³⁸ They can access care through emergency services, because other federal law requires hospitals to accept all patients who need emergency care.³³⁹ However, the

330. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012).

331. *King*, 135 S. Ct. at 2485.

332. *Id.* at 2483–84.

333. 26 U.S.C. § 36B(b)(2)(A); 42 U.S.C. § 18031(f)(3)(A); *King*, 135 S. Ct. at 2487.

334. *King*, 135 S. Ct. at 2495.

335. *Id.* at 2496.

336. *Id.* at 2495–96.

337. *Id.* at 2492.

338. *See, e.g.*, 2015 TRANSGENDER SURVEY, *supra* note 5, at 93–103 (describing transgender experiences in healthcare as reported by transgender people).

339. *See* Emergency Medical Treatment and Labor Act (EMTALA), 42

ACA sought to eliminate the need for people to only access medical care on an emergency basis.³⁴⁰ Instead, it incentivized people to obtain preventative services by making insurers cover preventative services without any cost-sharing.³⁴¹ Allowing physicians to discriminate against sexual minorities prevents them from obtaining the types of services Congress sought to make available to all Americans.

Allowing insurers to discriminate against transgender, intersex, and nonbinary people would similarly run counter to the ACA's overall design. Insurers are required to issue policies to sexual minorities and cannot charge them higher premiums.³⁴² But without Section 1557, insurers could deny claims for unique situations faced by only by sexual minorities. For example, a transgender man who has a uterus would need to receive routine procedures to screen for cervical cancer. His insurer could deny this claim because the patient is male and the procedure does not "match" his documented sex—which is precisely what happened to the plaintiff in *Rumble*.³⁴³ Additionally, insurers could have blanket exclusions for all gender-affirming services, including surgeries and hormone treatments.³⁴⁴

Both routine services and gender-affirming services are crucial to the physical and mental health of transgender people.³⁴⁵ If they cannot access these services because of a discriminatory insurer, the insurance plan they receive becomes less valuable to them. This reality runs counter to the ACA's requirements that insurers cover preventative care. Further, the law requires insurers to provide essential health benefits because Congress

U.S.C. § 1395dd (2012) (requiring all hospitals that operate emergency rooms and participate in Medicare to screen and stabilize any patients who arrive at the hospital suffering from emergency medical conditions).

340. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 656 n.2 (2012).

341. See 42 U.S.C. § 300gg-13 (requiring private health plans to provide preventative care services without any cost-sharing).

342. 42 U.S.C. § 300gg-1(a); *King*, 135 S. Ct. at 2486.

343. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *18 (D. Minn. Mar. 16, 2015).

344. See *Padula & Baker*, *supra* note 177, at 244 (describing how many insurers categorically deny transgender enrollees access to a variety of healthcare services).

345. See, e.g., 2015 TRANSGENDER SURVEY, *supra* note 5, at 107 (discussing the psychological distress experienced by many transgender people); van de Grift et al., *supra* note 20, at 138–39.

wanted to ensure that health plans met basic quality requirements.³⁴⁶ Denying sexual minorities care prevents them from accessing preventative care and other categories of health services.

Although allowing discrimination against sexual minorities would not drastically dismantle the ACA's framework of reforms in the way the Supreme Court discussed in *King v. Burwell*, discrimination against these groups undermines the central purposes of the ACA. The Supreme Court has determined that the purposes of the ACA are highly relevant to determining the statute's meaning. As the Supreme Court did in *King v. Burwell*, courts should protect the purposes of the ACA when an individual provision appears "untenable in light of the statute as whole."³⁴⁷

CONCLUSION

Transgender, intersex, and nonbinary people suffer from frequent discrimination by healthcare providers and insurers. An interpretation of the ACA's prohibition on sex discrimination that accurately reflects contemporary medical science would prohibit discrimination against sexual minorities. Sex discrimination in the ACA should be interpreted to prohibit discrimination based on any sex characteristic, including gender identity. This definition follows the ordinary meaning of biological sex and fits within the healthcare context, where providers and insurers have access to information about their patient's sex characteristics. It also advances the purposes of the statute and fits within the ACA's framework of comprehensive health reform.

Freedom from discrimination in healthcare is of particular importance for transgender people because many rely on gender-affirming services to have their identities recognized by the state and the general public.³⁴⁸ Even if other areas of antidiscrimination law ignore the dignity of transgender, intersex, and nonbinary people, the ACA provides an opportunity for these people to defend their right to receive healthcare without discrimination. Just as the Supreme Court has recognized the dignity of

346. The ACA requires insurers to provide coverage for certain types of services including hospitalization, maternity care, laboratory services, prescription drugs, and mental health treatment. 42 U.S.C. § 18022(b)(1).

347. 135 S. Ct. at 2495 (quoting *Dep't of Revenue of Or. v. ACF Indust., Inc.*, 510 U.S. 332, 343 (1994)).

348. Recall that some states still require transgender people to obtain specific services in order to have their sex identities recognized on official documents. See *supra* notes 80–84 and accompanying text.

minorities in constitutional law,³⁴⁹ so too should courts recognize the dignity of sexual minorities in healthcare settings: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”³⁵⁰ The ACA establishes principles and creates a statutory framework to do just that.

349. *See supra* note 254.

350. *Lawrence v. Texas*, 539 U.S. 588, 579 (2003).