20-1409

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAXWELL KADEL; JASON FLECK;
CONNOR THONEN-FLECK, by his next friends and parents;
JULIA MCKEOWN; MICHAEL D. BUNTING, JR.;
C.B., by his next friends and parents; SAM SILVAINE,
Plaintiffs-Appellees,

v.

NORTH CAROLINA STATE HEALTH PLAN FOR
TEACHERS AND STATE EMPLOYEES,
Defendant-Appellant,

On Appeal from the United States District Court
for the Middle District of North Carolina, No. 19-cv-00272
Honorable Loretta C. Biggs

BRIEF OF THE STATES OF CALIFORNIA, COLORADO, DELAWARE, HAWAII, ILLINOIS, MAINE, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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October 7, 2020

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INTERESTS OF AMICI

Amici—the States of California, Colorado, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia—file this brief in support of Plaintiffs-Appellees Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., and Sam Silvaine. Amici strongly support the right of transgender people—individuals whose gender identity differs from their sex assigned at birth—to live with dignity and to be free from discrimination in all aspects of their lives, including in their interactions at all levels of the healthcare system.

The pervasive discrimination against transgender people within the healthcare system nationwide is well-documented, as are the tangible economic, emotional, and health consequences suffered as a result. Amici have adopted laws and policies that prohibit discrimination against transgender people in accessing state benefits and public services like education, housing, employment, and healthcare. Amici's experience demonstrates that ensuring equality for transgender people improves health outcomes and significantly benefits our communities.

Congress enacted the Patient Protection and Affordable Care Act (ACA) to address significant barriers to healthcare caused by the inadequate and discriminatory healthcare system. Among the provisions intended to make healthcare more affordable and accessible, Congress created protections for patients from being charged more based on their health status, guaranteed coverage for individuals with health coverage, and made care more affordable by creating subsidies for coverage in the private market and expanding the Medicaid program.

Along with this wide range of reforms, Congress included a landmark civil rights provision that prohibits discrimination in healthcare, known as Section 1557. Section 1557 prohibits health programs and activities receiving federal financial assistance from discriminating against individuals on the basis of race, color, national origin, sex, age, or disability. It is designed to work together with the other provisions of the ACA to reduce the health disparities that made healthcare unequal for disadvantaged groups. As numerous authorities have observed, that prohibition protects transgender people from discrimination.

Defendant-Appellant the North Carolina State Health Plan's (the Health Plan) categorical exclusion for gender-affirming treatment is directly contrary to the ACA's anti-discrimination mandate. Amici share an interest in ensuring

that Section 1557 is applied consistently and uniformly across the nation, including to protect transgender people from discrimination. Amici submit this brief to provide the Court with the broader context of this case and to highlight the negative effects of the Health Plan's discriminatory acts.

ARGUMENT

I. SECTION 1557 IS A LANDMARK CIVIL RIGHTS LAW THAT PROHIBITS DISCRIMINATION AGAINST TRANSGENDER PEOPLE IN HEALTHCARE AND HEALTH INSURANCE

Congress enacted the ACA in 2010 to address significant barriers to healthcare access caused by inadequate and discriminatory health insurance coverage. *See, e.g.*, *Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 538-39 (2012). Importantly, the ACA contained an anti-discrimination provision, 42 U.S.C. § 18116, commonly known as Section 1557, which aimed to dismantle these barriers by prohibiting discrimination in healthcare at the federal level. Section 1557 prohibits health programs and activities receiving federal financial assistance, including medical providers, health systems, and health insurers, from discriminating against individuals on the basis of race, color, national origin, sex, age, or disability. It does so by incorporating the protected classifications and enforcement mechanisms from Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (race, color, and national origin); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et

seq. (sex); the Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq. (age); and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability). *See* 42 U.S.C. § 18116(a) (prohibiting discrimination "on the ground prohibited under" each of these statutes and providing that "[t]he enforcement mechanisms provided for and available under" each statute "shall apply for purposes of violations of this subsection").

Section 1557 was the first federal civil rights law to comprehensively prohibit discrimination in healthcare and to expressly extend prohibitions on sex discrimination to healthcare programs and services. *See, e.g.*, Valarie K. Blake, *An Opening for Civil Rights in Health Insurance After the Affordable Care Act*, 36 B.C.J.L. & Soc. Just. 235, 236 (2016) (describing Section 1557 as "the first healthcare-specific civil right, the first civil right to extend gender protections to healthcare (including protections for gender identity and sexual orientation discrimination), and the first civil right to broadly capture the private health insurance market"); Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 How. L.J. 855, 871-73, 880 (2012) ("For the first time, federally funded health programs will be prohibited from discriminating on the basis of sex."). To enforce its anti-discriminatory mandate, Section 1557 offers "a far-reaching new civil rights remedy," which allows individuals harmed by discrimination

to redress that harm through a private right of action. *Id.*; *see also, e.g.*, *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 239 (6th Cir. 2019) (joining numerous courts in holding that a plaintiff may enforce Section 1557 through a private right of action).

The systematic and widespread discrimination against transgender people is precisely the type of discrimination Section 1557 is meant to address. That discrimination is well-documented, as is the fact that it "create[s] barriers to accessing timely, culturally competent, medically appropriate, and respectful care." Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 Am. J. Pub. Health e31 (2014); *see also, e.g.*, Nat'l Women's Law Ctr., *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS* (May 2014).[1] Indeed, the U.S. Department of Health and Human Services (HHS), the federal agency tasked with implementing Section 1557, specifically addressed that discrimination in its initial regulations. 81 Fed. Reg. 31,444, 31,460-61 (May 18, 2016). HHS recognized that transgender individuals experienced difficulties in "the process of obtaining health

[1] *Available at* https://nwlc.org/wp-content/uploads/2015/08/lgbt_refusals_factsheet_05-09-14.pdf

insurance coverage," which often led those individuals to postpone or avoid needed healthcare, thus "exacerbat[ing] health disparities experienced by the LGBT population." *Id.* HHS recognized that by expressly incorporating Title IX, which bars discrimination "on the basis of sex," Congress sought to address that discrimination in Section 1557. *See id.* at 31,388 (explaining that the Rule's "inclusion of gender identity is well grounded in the law"). HHS predicted that Section 1557 would have the very effect Congress intended—that it would "increase the affordability and accessibility of health care for women and transgender individuals." *Id.*[2]

The Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020), makes clear that laws prohibiting discrimination "on the basis of sex" prohibit discrimination against transgender people. As the Court found in the context of Title VII, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* That reasoning readily applies to

[2] HHS has since reversed course under the current administration, eliminating regulatory protections for transgender individuals based on an erroneous interpretation of Section 1557. These new regulations have been challenged in court, including in a lawsuit brought by a coalition of States (including some Amici). *See New York v. HHS*, No. 20-cv-5583. Two courts have since enjoined the new rule.

other sex discrimination statutes. Indeed, following *Bostock*, this Court had "little difficulty" holding that Title IX—the sex discrimination statute Congress expressly incorporated into Section 1557—prohibits discrimination against transgender people. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

It is not surprising that numerous courts have recognized that Section 1557, like other laws that bar sex discrimination, prohibits discrimination based on gender identity. *See, e.g.*, *Tovar v. Essential Health*, 342 F. Supp. 3d 947, 957 (D. Minn. 2018); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wisc. 2018); *Flack v. Wis. Dept of Health Servs.*, 328 F. Supp. 3d 931, 951 (W.D. Wis. 2018); *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (S.D. Cal. 2017). Federal case law has long held that federal civil rights laws that bar sex discrimination—including Title IX—prohibit discrimination on the basis of gender identity and sex stereotyping. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 223 (6th Cir. 2016) (Title IX); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009) (Title IX); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737, 739 (6th Cir. 2005) (Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (Title VII). By extension, Section 1557's prohibition on discriminating

"on the basis of sex" likewise reaches discrimination based on sex stereotyping. And as many courts have recognized, that necessarily includes transgender individuals who, "[b]y definition … do[] not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Tovar*, 342 F. Supp. 3d at 952.

Consistent with this weight of authority, in 2017, Defendant-Appellant the North Carolina State Health Plan heeded Section 1557's mandate and provided coverage for gender-confirming treatment to its state enrollees. *See, e.g.*, JA 31-32 (citing the Health Plan's conclusion that the coverage was necessary to "comply with federal law"); Joe Killian, *North Carolina officials cut off benefits to transgender individuals*, NC Policy Watch (Oct. 25, 2018) (explaining that 2017 was "the first coverage year in which the plan extended that coverage to transgender people – a move taken to stay in line with federal anti-discrimination policies").[3] The moment North Carolina State Treasurer Dale Folwell—a defendant in this case—took office, he "allowed that coverage to expire at the first opportunity." *Id.* Treasurer Folwell and the Health Plan did so despite the fact that the medical community has developed

[3] *Available at* http://www.ncpolicywatch.com/2018/10/25/state-treasurer-dale-folwell-cuts-off-benefits-to-transgender-north-carolinians

"modern accepted treatment protocols for gender dysphoria" that provide effective treatment for transgender people suffering from gender dysphoria. *Grimm*, 972 F.3d at 586; *see, e.g.*, Am. Med. Ass'n, *Issue Brief: Health insurance coverage for gender-affirming care of transgender patients* (2019) ("Every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people and has called for health insurance coverage for treatment of gender dysphoria.").[4] Treasurer Folwell ignored that evidence, characterizing transition-related healthcare as mere "elective non-emergency procedures." NC Policy Watch, *supra* p. 8 (quoting e-mail statement by Treasurer Folwell).

The North Carolina State Health Plan's discriminatory exclusion means that enrollees like Plaintiffs cannot access medically necessary gender-confirming treatment that medical experts recognize "save lives." *Id.*; *see also* JA 28-31. And it means that although non-transgender enrollees in the Heath Plan receive coverage for all of their medically necessary mental health,

[4] *Available at* https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf

prescription drug, and surgical needs, transgender enrollees do not. That is unquestionably the type of sex discrimination Section 1557 prohibits.

II. THE ACA'S ANTI-DISCRIMINATION MANDATE SHOULD BE APPLIED UNIFORMLY ACROSS THE COUNTRY

The ACA plays a crucial role in setting appropriate minimum standards for individuals' access to healthcare services across the country. The Health Plan's refusal to comply with Section 1557's anti-discrimination mandate thwarts the entire purpose of the ACA.

Before Congress enacted the ACA, individual States played a leading role in regulating healthcare and health insurance, but there was a dearth of leadership or consistency at the federal level. As a result, there was "considerable geographic variation in insurance coverage, access to care, health status, quality of care, and cost of care." Sara R. Collins & Jeanne M. Lambrew, *Federalism, the Affordable Care Act, and Health Reform in the 2020 Election*, The Commonwealth Fund (Jul. 29, 2019).[5] And while "[p]rior to the ACA, federal and state law included some nondiscrimination protections," they "had only a limited effect in ensuring that coverage m[et] the needs of all consumers." Katie Keith et al., *Nondiscrimination Under the*

[5] *Available at* https://www.commonwealthfund.org/publications/fund-reports/2019/jul/ federalism-affordable-care-act-health-reform-2020-election

Affordable Care Act, Georgetown Univ. Health Policy Inst., SSRN 4 (2013). The net result of this patchwork system—along with "the skyrocketing cost of healthcare and health insurance" nationwide—was to leave "nearly 47 million uninsured people in th[e] country" with "worse health outcomes" and trouble affording and accessing care. *The Instability of Health Coverage in America: Hearing Before the Subcomm. on Health of the H. Comm. on Ways & Means*, 110th Cong. 50, at 2, 4 (Apr. 15, 2008); *see also, e.g.*, Inst. of Med. Comm. on Health Ins. Status and Its Consequences, *America's Uninsured Crisis: Consequences for Health and Health Care* 95-96, 108-09 (2009) (describing the "tremendous variation in uninsurance rates across the United States," which had "grave implications for the quality and timeliness of care").

Through the ACA, Congress sought to "tear down the jurisdictional divides erected by state lines" that were inhibiting equal access to healthcare across the country. John A. Cogan, Jr., *The Affordable Care Act's Preventive Services Mandate: Breaking Down the Barriers to Nationwide Access to Preventive Services*, 39 J. Law Med. Ethics 355, 355 (2011). The ACA did so by substantially reforming the federal regulation of private health insurance and by providing "new minimum federal standards" aimed at increasing access to health insurance and healthcare. Keith et al., *supra* p. 10, at 9. The need for uniform minimum standards animated many of the ACA's most

important reforms, including its requirement that insurers accept every individual that applies for coverage (the "guaranteed issue" requirement), its prohibition on charging individuals more based on their pre-existing health conditions (the "community rating" requirement), its prohibition on limiting or excluding coverage for individuals with preexisting conditions, its new gender-rating standards, and its minimum essential health benefits requirements—"the nation's first federal benefits standard." Nat'l Ass'n of Ins. Comm'rs, *Implementing the Affordable Care Act's Insurance Reforms: Consumer Recommendations for Regulators and Lawmakers* (2012).[6]

The ACA also sought to eliminate the deeply entrenched healthcare disparities facing disadvantaged groups across the country, including lesbian, gay, bisexual, and transgender (LGBT) individuals. *See, e.g.*, Kaiser Family Foundation, *The Affordable Care Act and Insurance Coverage Changes by Sexual Orientation* (Jan. 2018). LGBT individuals "often face challenges and barriers to accessing needed health services and, as a result, can experience worse health outcomes." Kaiser Family Foundation, *Issue Brief: Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender*

[6] *Available at* https://www.naic.org/documents/committees_conliaison_1208_consumer_recs_aca.pdf

Individuals in the U.S. (May 2018). That disparity is especially heightened for transgender people, who are "more likely to live in poverty and less likely to have health insurance than the general population," and face harassment and discrimination "when seeking routine health care." *Id.* at 14; *see also* 81 Fed. Reg. at 31,460 (citing studies showing that 25% of transgender people reported having been refused needed health care or having been subject to harassment in medical settings, which "often led those individuals to postpone or avoid needed healthcare").

Section 1557 was part of Congress's effort to eliminate these types of health disparities, by creating "new minimum federal standards to protect against discrimination." Keith et al., *supra* p. 10, at 9; *see also* Kellan Baker, *Open Doors for All: Sexual Orientation and Gender Identity Protections in Health Care*, Center for American Progress (Apr. 30, 2015) (describing the ACA's "nondiscrimination protections that are both nationwide in scope and clearly applicable throughout the health system").[7] Indeed, HHS recognized as much in its initial regulations, emphasizing the importance of Section 1557 to improving the lives of transgender people. 81 Fed. Reg. at 31,460.

[7] *Available at* https://www.americanprogress.org/issues/lgbtq-rights/reports/2015/04/30/112169/open-doors-for-all/

To complement and build upon the ACA's minimum standards, many States have enacted their own statutory or regulatory protections against discrimination. For instance, twenty States and the District of Columbia "prohibit health insurers from excluding coverage for transgender health services." Am. Med. Ass'n, *supra* p. 8; *see also* Baker, *supra* p. 13, (as of 2015, "more than 200 jurisdictions across the United States, including 22 States, have laws expressly prohibiting discrimination on the basis of sexual orientation and/or gender identity"). Research shows that those efforts, together with the ACA's protections, have significantly increased access to healthcare for LGBT individuals and their families. *See* Kaiser Family Foundation, *supra* p. 12, at 14. Indeed, "since the implementation of the ACA, rates of uninsurance decreased significantly among LBG adults," and "there has been a five-fold increase in the number of businesses offering at least one health plan that includes coverage of transgender services." *Id.* at 15, 23.

In Amici's experience, these reforms offer significant positive impacts on health outcomes for our transgender populations. *See, e.g.*, Cal. Dep't of Ins., *Economic Impact Assessment* (Apr. 13, 2012) (concluding that the aggregate costs of California's antidiscrimination rules would be "insignificant and immaterial" while yielding significant benefits to transgender individuals including suicide reduction, improvements in mental

health, reduction in substance use rates, higher rates of adherence to HIV care and reduction in self-medication)[8]; Am. Med. Ass'n, *supra* p. 8 (citing studies documenting the "[p]ositive health effects from gender-affirming care"). By contrast, exclusions like the one North Carolina State Health Plan enacted in this case frustrate the purpose of the ACA to ensure healthcare access for all people in the nation.

When entities like the Health Plan selectively deny coverage to disadvantaged groups, they create confusion, uncertainty, and inconsistency. These negative consequences are especially heightened for transgender people, who are already reluctant to seek medical care. The Health Plan's discriminatory denial of care goes against the very purpose of Section 1557, which was to reduce the health disparities faced by such disadvantaged groups nationwide. The Health Plan's actions in this case are not only unlawful, but they undermine the very purposes of the ACA.

CONCLUSION

This Court should affirm and remand to the district court so that Plaintiffs may pursue their claims against the Health Plan.

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[8] *Available at* https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf

Dated: October 7, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5), because it contains 2,861 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Rule 32(a)(5) because it has been prepared in 14-point Times New Roman font.

October 7, 2020 */s/ Nicole Ries Fox*