

# Using Federal Nondiscrimination Laws to Avoid ERISA: Securing Protection from Transgender Discrimination in Employee Health Benefit Plans

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*Recent attempts to repeal the Affordable Care Act and the potential rollback of the interpretation of the protections the Act affords transgender people<sup>1</sup> put transgender people at risk of being denied services and coverage for gender-affirming care. This Article provides advocates with alternative legal arguments to help employees bring claims when their employer provides a health benefit plan that discriminates on the basis of gender identity. These arguments can avoid the Employee Retirement Income Security Act’s broad preemption scheme and lack of nondiscrimination provisions. This Article proposes that, based on a narrow exception to preemption regarding the Employee Retirement Income Security Act’s construction with other federal laws and the case law interpreting that exception, federal nondiscrimination laws — including Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act — may and must play a role in regulating discrimination on the basis of gender identity in employee health benefit plans.*

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1. Though typically person-first language is most respectful, this Article will use “transgender people” or “transgender individuals” for purposes of concision.

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## I. INTRODUCTION

One of the most important laws for transgender people in America today may be the Affordable Care and Patient Protection Act (“Affordable Care Act”). The Affordable Care Act prohibits discrimination on the basis of sex, which — as of December 2018 — includes gender identity and transgender status, by most insurance companies and health care providers in the United States.<sup>2</sup> More specifically, the Affordable Care Act prevents insurance providers in every state from categorically excluding or denying coverage for gender-affirming healthcare, such as surgical procedures or hormone replacement therapies.<sup>3</sup> However, this interpretation of the rule is currently enjoined.

However, with recent attempts to repeal the Affordable Care Act<sup>4</sup> and a potential agency rule that would interpret the Affordable Care Act’s sex discrimination provision to exclude protections for transgender people by defining sex biologically,<sup>5</sup> transgender people are at risk of being denied services and coverage. Therefore, legal advocates who work with the transgender community need to make innovative legal arguments to ensure protection for their clients.

If or when the Affordable Care Act or its implementing rules are repealed or undermined, the Employee Retirement Income Security Act of 1974 (“ERISA”) will play the premiere role in regulating employee health benefit plans. However,

2. *Know Your Rights – Healthcare*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://www.transequality.org/know-your-rights/healthcare> (last visited Nov. 2, 2018).

3. *See id.* (listing insurance practices that are prohibited by the ACA).

4. *See, e.g., Amber Phillips, Republicans’ Latest Last-ditch Attempt to Repeal Obamacare Is Another Legislative Mess*, WASH. POST (Sept. 25, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/09/25/republicans-latest-attempt-to-repeal-obamacare-is-another-legislative-and-political-mess/?utm\\_term=.779dbeb452aa](https://www.washingtonpost.com/news/the-fix/wp/2017/09/25/republicans-latest-attempt-to-repeal-obamacare-is-another-legislative-and-political-mess/?utm_term=.779dbeb452aa); *see also* Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017), <http://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832>.

5. *See* Press Release, Nat’l Ctr. for Transgender Equal., Trump Admin. Says It Will Try to Legalize Anti-Transgender Discrimination in Healthcare (May 2, 2017), <http://www.transequality.org/press/releases/trump-administration-says-it-will-try-to-legalize-anti-transgender-discrimination-in> (“[T]he U.S. Department of Health and Human Services said it plans to roll back the historic regulations implementing the Affordable Care Act’s nondiscrimination provision.”); *see also* Erica L. Green, Katie Benner & Robert Pear, *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> (“The Trump administration is considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth.”); Christine Grimaldi, *Trump Administration Reverses Course on Obamacare’s Civil Rights Protections*, REWIRE (May 2, 2017), <https://rewire.news/article/2017/05/02/trump-administration-reverses-course-obamacares-civil-rights-protections>; Nathaniel Weixel, *Trump expected to roll back LGBT protections in ObamaCare*, THE HILL (Aug. 12, 2017), <http://thehill.com/policy/healthcare/346246-trump-expected-to-roll-back-lgbt-protections-in-obamacare>.

ERISA does not contain a sex nondiscrimination provision that could protect employees from discrimination in health services or plans on the basis of gender identity. But based on a narrow exception to ERISA's broad preemption scheme and several federal courts' interpretations of that exception, federal nondiscrimination laws that protect transgender individuals from employment discrimination can help ensure coverage of gender-affirming care in employee health plans.

Part II of this Article will explain the core terms and concepts related to gender identity and protections afforded to transgender and non-binary individuals under the Affordable Care Act. It will also introduce an alternative legal strategy to assist transgender individuals seeking coverage if the Affordable Care Act's protections are undermined. Part III will explain the nondiscrimination provisions of ERISA and will explain how federal nondiscrimination laws can overcome ERISA's broad governance of health benefit plans in the United States. It will argue, based on the text of the statute and case law interpreting ERISA, that federal nondiscrimination laws should regulate discrimination in employee health benefit plans despite ERISA's broad preemption scheme. Finally, Part IV will provide a legal overview of how federal nondiscrimination laws can protect transgender employees' access to gender-affirming care. The Article will conclude by recommending the best jurisdictions in which to bring these claims.

## II. BACKGROUND

### A. Transgender 101 & Healthcare Overview

Necessary to framing this discussion is an overview of key terminology and of healthcare services that some transgender people may seek. First, "gender identity" is "[a]n individual's internal sense of being male, female, or something else."<sup>6</sup> Second, "transgender" is "[a] term for people whose gender identity, expression or behavior is different from those typically associated with their assigned [or designated] sex at birth."<sup>7</sup> "Transgender is a broad term"<sup>8</sup> and is sometimes used by persons who are non-binary or gender non-conforming.<sup>9</sup> Third, "non-binary" is a commonly used term for "[p]eople whose gender is not [exclusively] male or female."<sup>10</sup> Finally, some transgender or non-binary people

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6. *Tips for Journalists – Writing About Transgender People and Issues*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 26, 2014), <http://www.transequality.org/issues/resources/fact-sheet-writing-about-transgender-people-and-issues>.

7. *Id.*

8. *Id.* (explaining that "[t]ransgender is correctly used as an adjective, not a noun, thus "transgender people" is appropriate but "transgenders" [or "transgendered"] is often viewed as disrespectful.").

9. *Glossary of Terms*, STONEWALL, <https://www.stonewall.org.uk/help-advice/glossary-terms> (last visited Nov. 2, 2018).

10. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <http://www.transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> stating ("Most people – including most transgender people – are either male or female. But some people don't neatly fit into the categories of 'man' or 'woman,' or 'male' or 'female.' For example, some people have a gender that blends elements of being a man or a woman, or a gender that is different than either male or female. Some people don't

experience “gender dysphoria,” which is “an individual’s discontent with [their] assigned gender,”<sup>11</sup> sometimes resulting in “significant distress and/or problems functioning associated with this conflict.”<sup>12</sup>

Many transgender or non-binary people take steps to affirm their gender identity.<sup>13</sup> This can include changing one’s name, pronouns, or external appearance.<sup>14</sup> Some individuals may choose to undergo gender-affirming medical care,<sup>15</sup> such as hormone replacement therapy or gender-confirming surgeries, such as breast augmentation or mastectomy.<sup>16</sup> Throughout this article, these treatments and procedures will be referred to generally as “gender-affirming care.” Gender-affirming healthcare is considered medically necessary for many transgender or non-binary people, especially those facing gender dysphoria.<sup>17</sup>

## B. Protections under the Affordable Care Act

Gender-affirming care is expensive — prohibitively so for patients without health insurance coverage. For example, the cost of a transmasculine mastectomy, or “top surgery,” can range up to \$10,000.<sup>18</sup> Prior to the passage of the Affordable

identify with any gender. Some people’s gender changes over time. People whose gender is not male or female use many different terms to describe themselves, with non-binary being one of the most common. Other terms include genderqueer, agender, bigender, and more. None of these terms mean exactly the same thing — but all speak to an experience of gender that is not simply male or female.”); *see generally*, Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283 (2017).

11. *What is Gender Dysphoria?*, Am. Psychiatric Ass’n, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

12. *Id.*

13. *See What Do I Need to Know About Transitioning*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning> (last visited Nov. 2, 2018) (describing the ways in which transgender individuals may transition socially and medically).

14. *Id.* *See also* WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE 16 (7<sup>th</sup> ed., 2012) [hereinafter SOC]; *see Ethical Guidelines For Professionals*, WPATH, <https://www.wpath.org/about/ethics-and-standards> (last visited Nov. 4, 2018) (stating that “WPATH has established internationally accepted Standards of Care (SOC) for the treatment of individuals with gender dysphoria.”). Courts have also recognized the WPATH Standards of Care (collectively, “Standards of Care”). *See, e.g., De’lonta v. Johnson*, 708 F.3d 520, 522–23 (4<sup>th</sup> Cir. 2013) (characterizing the Standards of Care as the “generally accepted protocols for the treatment of [gender identity disorder]”, or gender dysphoria).

15. *See* SOC, *supra* note 14, at 5 (describing “[m]edical treatment options. . . which are effective in alleviating gender dysphoria”).

16. *See Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> (listing transition-related medical procedures, including hormone therapy and “various surgeries to make one’s face, chest, and anatomy more in line with one’s gender identity”); *see also* SOC, *supra* note 14, at 5.

17. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH (Dec. 21, 2016) [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1352&pk\\_association\\_webpage=3947](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947) [hereinafter *Position Statement*].

18. *See Top Surgery Costs*, FTM SURGERY NETWORK, <http://www.topsurgery.net/costs/> (last visited Oct. 12, 2018) (“In general, the cost of FTM Top Surgery ranges from \$3500 – \$9000 USD. This may or

Care Act and later regulations interpreting the Act, many insurance companies categorically excluded gender-affirming healthcare and services to individuals by labeling these medically necessary procedures “cosmetic.”<sup>19</sup> Even though some insurance companies now cover or partially cover gender-affirming care,<sup>20</sup> people must still secure at least one “letter of referral” from a mental health professional in order for their treatment or procedure to be considered “medically necessary” to relieve their symptoms of gender dysphoria.<sup>21</sup> For many individuals, this additional cost requirement can be a barrier to seeking necessary care.<sup>22</sup>

Thus, access to care for many transgender or non-binary individuals may be limited by a lack of adequate health insurance coverage, especially if the individual does not have other monetary resources to pay for the expense.<sup>23</sup> Lack of health insurance coverage for gender-affirming care is especially concerning considering that “transgender individuals have . . . been found to live in extreme poverty — a sample of transgender adults in the United States found that participants were nearly four times more likely to have a household income of less than \$10,000 per year compared to the general population.”<sup>24</sup> Thus, securing insurance coverage for gender-affirming care is crucial in order for many individuals to live their most authentic life.<sup>25</sup>

Some states began prohibiting insurance companies from categorically excluding gender-affirming care as early as 2013.<sup>26</sup> By March 2016, fifteen states and the District of Columbia had prohibited transgender care exclusions.<sup>27</sup> No

may not include consultation fees.”); see also Alyssa Jackson, *The High Cost of Being Transgender*, CNN (July 31, 2015), <http://www.cnn.com/2015/07/31/health/transgender-costs-irpt/index.html>.

19. See, e.g., Jennifer Brown, *Transgender People Seek Coverage of Procedures Insurers Call Cosmetic*, DENVER POST (Dec. 17, 2015), <http://extras.denverpost.com/transgender/health.html>; see also Position Statement, *supra* note 17.

20. See OUT2ENROLL, *Summary of Findings: 2018 Marketplace Plan Compliance with Section 1557 1* (2017), <https://out2enroll.org/out2enroll/wp-content/uploads/2017/11/Overview-of-Trans-Exclusions-in-2018-Marketplace-Plans-1.pdf> (summarizing findings from Out2Enroll’s analysis of 548 silver marketplace plan options in 2018).

21. See, e.g., *Gender Reassignment Surgery*, AETNA (Aug. 26, 2017), [http://www.aetna.com/cpb/medical/data/600\\_699/0615.html](http://www.aetna.com/cpb/medical/data/600_699/0615.html) (detailing what criteria the insurance company requires in order for gender-affirming procedures to be medically necessary).

22. See Stephanie L. Budge, *Psychotherapists as gatekeepers: An Evidence-Based Case Study Highlighting the Role and Process of Letter Writing for Transgender Clients*, 52(3) PSYCHOTHERAPY 287 (2015).

23. See SOC, *supra* note 14, at 33 (identifying inability to pay and underinsurance as factors that prevent transgender individuals from accessing health care services).

24. *Intersections with Subjective Social Status*, AMERICAN PSYCHOLOGICAL ASS’N, <http://www.apa.org/pi/ses/resources/class/intersections.aspx> (last visited Oct. 12, 2018) (citing Grant, Mottet and Tanis, 2011); see also Brad Sears & Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, WILLIAMS INST. (June 2012), <https://williamsinstitute.law.ucla.edu/headlines/beyond-stereotypes-poverty-in-the-lgbt-community/>.

25. See generally SOC, *supra* note 14.

26. See Katie Keith, *15 States and D.C. Now Prohibit Transgender Insurance Exclusions*, GEORGETOWN UNIV. HEALTH POLICY INST. CTR. ON HEALTH INS. REFORMS (Mar. 30, 2016), <http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions> (stating that “[i]n March 2013 . . . three states and DC had prohibited transgender exclusions.”).

27. *Id.* (“These states [were] California, Colorado, Connecticut, Delaware, District of Columbia,

federal law prohibited insurance companies from denying coverage to a person based on their gender identity until the Department of Health and Human Services (“HHS”) issued regulations interpreting the Affordable Care Act.<sup>28</sup> Section 1557 of the Affordable Care Act

prohibits discrimination in health coverage and care . . . on the basis of race, color, national origin, sex, age, or disability in health programs and activities that . . . receive federal funding, . . . are administered by a federal agency, such as Medicaid, . . . or [are] governed by any entity established under Title I of the [Affordable Care Act], including the federal Health Insurance Marketplace . . . and state-run Marketplaces.<sup>29</sup>

In September 2015, the Office of Civil Rights (“OCR”) of HHS issued a notice of proposed rulemaking regarding Section 1557 called “Nondiscrimination in Health Programs and Activities.”<sup>30</sup> OCR “proposed that the term ‘on the basis of sex’ includes, but is not limited to, discrimination on . . . sex stereotyping, and gender identity.”<sup>31</sup> By proposing that discrimination on the basis of sex includes discrimination on the basis of gender identity, the agency noted that courts, including in the context of Section 1557, “have recognized that sex discrimination includes discrimination based on gender identity.”<sup>32</sup>

In the final rule, effective July 2016, OCR maintained this interpretation of sex discrimination and defined “gender identity” as “an 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.”<sup>33</sup> Additionally, OCR clarified that “references to the term ‘gender identity’ [encompass] ‘gender expression’ and ‘transgender status.’”<sup>34</sup> With this final rule, the “regulation makes it clear that most insurers cannot limit or deny coverage

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Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, Nevada, Oregon, Rhode Island, Vermont, and Washington.”).

28. See *Nondiscrimination Protection in the Affordable Care Act: Section 1557*, NAT’L WOMEN’S LAW CTR., <https://nwlc.org/resources/nondiscrimination-protection-affordable-care-act-section-1557/> (last viewed Nov. 2, 2018); see *Health Insurance*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., <https://www.hhs.gov/programs/health-insurance/index.html> (last visited Nov. 4, 2018) (describing Section 1557 as “the first broad prohibition against sex discrimination in health care”).

29. *Final HHS Regulations on Health Care Discrimination: Frequently Asked Questions*, NAT’L CTR. FOR TRANSGENDER EQUAL., <http://www.transequality.org/sites/default/files/HHS-1557-FAQ.pdf> (last viewed Nov. 4, 2018) [hereinafter *HHS Regulations*].

30. Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172 (to be codified at 45 C.F.R. pt. 92) (proposed Sept. 8, 2015).

31. *Id.* at 54,188.

32. *Id.* at 54,176. At least two federal courts have held that the plain language of Section 1557 protects people from discrimination based on gender identity. *Tovar v. Essentia Health Partners, Inc.*, No. 0:16-cv-00100, 2018 WL 4516949 (D. Minn. Sept. 20, 2018); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017). Another federal district court held that a categorical exclusion of gender identity from the Affordable Care Act’s nondiscrimination protections violates the Equal Protection Clause of the United States Constitution. *Boyden v. Conlin*, No. 17-cv-264-wmc, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018).

33. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,384 (May 18, 2016) (to be codified at 45 C.F.R. § 92.4).

34. *Id.* at 31,385.

simply because the treatment someone is getting is related to their gender identity.”<sup>35</sup>

Under the final rule, most insurers will violate Section 1557 if they categorically exclude coverage for gender-affirming care or if they refuse to cover a service for a transgender person when that same service is covered for a non-transgender person.<sup>36</sup> For example, “[s]ince most treatments used for transitioning are also used by non-transgender people for the treatment of other conditions — including hormone therapy, hysterectomies, orchiectomies, and reconstructive surgeries — it would be discriminatory for an insurer to deny those health services to transgender people.”<sup>37</sup>

These protections are significant as they have required many insurance companies to eliminate some barriers for coverage of gender-affirming care deemed medically necessary. A majority of states still provide no protections for transgender people seeking gender-affirming care.<sup>38</sup> But because of the Section 1557 regulations, many insurers removed categorical transgender care exclusions.<sup>39</sup>

After the regulation was finalized, eight states and three religious medical groups challenged the statutory interpretation of Section 1557 and requested a declaratory judgment of invalidity under the Administrative Procedure Act and the Religious Freedom Restoration Act.<sup>40</sup> The District Judge granted a preliminary injunction, blocking the enforcement of the regulations nationwide.<sup>41</sup> Under the *Chevron* two-step analysis,<sup>42</sup> the judge reasoned that because Congress clearly meant “sex” to mean only “biological sex,” *Chevron* deference did not apply, and HHS did not have the “authority to interpret such a significant policy decision.”<sup>43</sup> Following the decision, the Department of Justice, representing HHS, chose not to appeal the decision and instead asked the court for a remand so that HHS could determine the validity of the regulations.<sup>44</sup> The judge granted the remand.<sup>45</sup>

In August 2017, the Department of Justice announced that it was reviewing a draft of a proposed rule prepared by HHS regarding Section 1557.<sup>46</sup> The Office of

35. *HHS Regulations*, *supra* note 29.

36. *Id.*

37. *Id.* “Insurance carriers are still permitted to make a case-by-case determination of whether treatment is medically necessary for a particular individual (just as they do with every condition), though they cannot apply a higher standard for medical necessity for transgender people.” *Id.*

38. Currently, only eighteen states explicitly prohibit transgender exclusions in both private insurance and Medicaid coverage. *Map: State Health Insurance Rules*, NAT’L CTR. FOR TRANSGENDER EQUAL. (May 13, 2016), <https://www.transequality.org/issues/resources/map-state-health-insurance-rules>.

39. *OUT2ENROLL*, *supra* note 20, at 1–2.

40. Complaint, *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7:16-cv-00108-O).

41. Order, *Franciscan Alliance Inc. v. Burwell*, 227 F. Supp. 3d 660, 670, 695 (N.D. Tex. 2016).

42. *Id.* at 685 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

43. *Id.* at 687.

44. Grimaldi, *supra* note 5.

45. Dani Kass, *Texas Judge Blocks ACA Transgender Rule*, LAW360 (Jan. 3, 2017), <https://www.law360.com/articles/876664/texas-judge-blocks-aca-transgender-rule>.

46. Weixel, *supra* note 5.

Management and Budget (“OMB”) began reviewing the rule in April 2018.<sup>47</sup> In October 2018, the *New York Times* reported that two proposed rules were under review at OMB that would define “sex” as “as biological, immutable definition determined by genitalia at birth[.]” “essentially eradicat[ing] federal recognition of the estimated 1.4 million” transgender or non-binary people in civil rights laws, including the Affordable Care Act.<sup>48</sup> The proposed rule is slated to be posted in the Federal Register sometime in the fall of 2018,<sup>49</sup> after which the public must have time to submit comments.<sup>50</sup> Although the rule would not amend the Affordable Care Act’s text prohibiting discrimination on the basis of sex, advocates must begin to consider legal arguments outside the realm of Section 1557 to ensure that their transgender or non-binary clients can sufficiently access gender-affirming care.

### C. An Alternative Path Toward Protections for Transgender Employees

With a possible repeal of the Affordable Care Act and a rollback of its implementing regulations looming, ERISA may predominantly govern nondiscrimination in healthcare. However, ERISA itself contains limited nondiscrimination provisions. Therefore, advocates will have to use more protective federal laws, such as Title VII of the Civil Rights Act of 1964 (“Title VII”) and Title I of the Americans with Disabilities Act of 1990 (“ADA”), to protect access to medically necessary gender-affirming care for transgender employees, free from discrimination on the basis of their identity.

## III. OVERCOMING THE PROBLEM OF ERISA

### A. ERISA and Nondiscrimination

The Employee Retirement Income Security Act is a federal law that sets “minimum standards” for most health benefits plans in the private sector to protect individuals obtaining health insurance through their employer.<sup>51</sup> Though ERISA’s “minimum standards” did not historically contain any nondiscrimination provisions, more recent amendments to the law have expanded the protections available to covered employees.<sup>52</sup> However, these amendments provide limited

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47. Katie Keith, *ACA Regulations: What to Expect this Fall*, Health Affairs Blog, (Oct. 22, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20181022.393657/full/>.

48. Erica L. Green, Katie Benner & Robert Pear, *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

49. HHS Regulatory Agenda, 83 Fed. Reg. 58019 (Nov. 16, 2018).

50. *Id.* See *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/HCRL-FAQ> (last visited Nov. 4, 2018) (explaining that “[f]ormal regulations like the one about [Section 1557] are different than guidance documents (like the guidance supporting transgender students) or executive orders: it’s much harder to roll them back. It can take months or even years to rewrite or undo a regulation, and the Trump Administration would need to first put out a draft regulation and give members of the public enough time to comment on it.”).

51. 29 U.S.C.A. § 1001 (2012).

52. *Health Plans & Benefits: ERISA*, U.S. DEP’T OF LABOR, <https://www.dol.gov/general/topic/>

protection to transgender employees or beneficiaries.

The passage of multiple nondiscrimination provisions of the Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”), the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), and the Affordable Care Act have made ERISA’s nondiscrimination protections more robust, but they are ultimately unhelpful to transgender or non-binary employees. For example, the MHPAEA amendments to ERISA, or ERISA § 1185(a) Parity in mental health and substance use disorder benefits, requires mental health care to be treated equally to physical or surgical care.<sup>53</sup> This amendment may be helpful for transgender individuals in seeking mental health services to secure letters of referral;<sup>54</sup> however, once a person is seeking hormone therapy, surgeries, or both, ERISA § 1185(a)’s nondiscrimination protections no longer apply.

HIPAA amended ERISA to prohibit discrimination against individual participants and beneficiaries based on certain health factors such as health status, medical condition, and disability.<sup>55</sup> These nondiscrimination protections apply only to enrollment eligibility in an employee benefit plan;<sup>56</sup> they do not apply to benefits or exclusions.<sup>57</sup> Further, neither ERISA, HIPAA, nor the statute’s implementing regulations, define the terms health status, medical condition, and disability,<sup>58</sup> so it is unclear whether transgender people would be protected from discrimination in plan enrollment under the HIPAA amendments to ERISA.

The “Affordable Care Act amended ERISA to incorporate several health coverage market reforms,”<sup>59</sup> but did not include the nondiscrimination components of Section 1557. The closest provision is a nondiscrimination provision for “health status.”<sup>60</sup> Therefore, it is again unclear whether transgender people are protected from discrimination under ERISA.

In sum, the nondiscrimination provisions now within ERISA are not enough to protect individuals seeking coverage for gender-affirming care. Therefore, advocates must next look to the laws that provide broader protection from discrimination in the privileges of employment — Title VII and the Americans with Disabilities Act.

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health-plans/erisa (last visited Nov. 4, 2018).

53. *Health Benefits, Retirement Standards, and Workers’ Compensation: Employee Benefit Plans*, U.S. DEP’T OF LABOR (Dec. 2016), <https://webapps.dol.gov/elaws/elg/erisa.htm#BasicPro> [hereinafter *Health Benefits*].

54. See Part 0, *infra*.

55. 29 U.S.C. § 1182(a)(1) (2012).

56. See *id.* at § 1182(a) (setting restrictions for “group health plan[s]” and “insurance issuer[s] offering group health insurance coverage”).

57. *Id.* at § 1182(b).

58. Notably, although transgender individuals are excluded from the ADA’s definition of disability, 42 U.S.C. § 12211 (2012), a federal district court recently concluded that gender dysphoria, which may or may not accompany transgender or non-binary status, is not excluded from the definition of disability. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at \*2 (E.D. Pa. May 18, 2017).

59. *Health Benefits*, *supra* note 53.

60. See 42 U.S.C. § 300gg-4(a)(1)-(9) (2012) (stating that “[a] group health plan and a health insurance issuer . . . may not establish rules for eligibility (including continued eligibility) of any individual to enroll . . . based on . . . (1) Health status.”).

## B. ERISA's Relationship to Federal Nondiscrimination Laws

Congress intended ERISA to be the exclusive law governing employee benefits plans,<sup>61</sup> meaning that it preempts both state and other federal laws on that subject. Nevertheless, Title VII and the ADA should still provide nondiscrimination protections applicable to transgender employees in the provision of health benefits plans despite ERISA's broad preemption scheme.

Title VII prohibits discrimination on the basis of sex with respect to "terms, conditions, or privileges of employment."<sup>62</sup> Similarly, the ADA prohibits "discrimination against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment."<sup>63</sup> The Supreme Court has held that employee retirement plans that discriminate on the basis of sex are benefits of employment governed by Title VII.<sup>64</sup> Additionally, two recent federal district court decisions held that denial or exclusion of gender-affirming care in a health benefits plan is sex discrimination, implying that — like retirement plans — an employee health benefit plan is a privilege, or benefit, of employment.<sup>65</sup>

In *Baker v. Aetna Life Insurance Co.*, the Northern District Court of Texas held that a transgender employee could bring a Title VII claim against her employer because she "plausibly allege[d] that she was denied employment benefits based on her sex"<sup>66</sup> when she was denied coverage for gender-affirming surgery.<sup>67</sup> The employee brought three claims against her employer and the administrator of the health plan: one for gender identity discrimination in violation of Section 1557 of the ACA, one for wrongful denial of benefits under ERISA, and one for sex discrimination in violation of Title VII.<sup>68</sup> The court dismissed the plaintiff's ACA claim for failure to state a cause of action — at the time the plaintiff brought the action, HHS's interpretation of Section 1557's sex discrimination provision was merely a Notice of Proposed Rulemaking.<sup>69</sup> Similarly, the court dismissed

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61. See, e.g., 29 U.S.C. § 1001 (2012) (describing Congress's assessment of the impact of employee benefit plans on interstate commerce); 29 U.S.C. § 1144(a) (2012) (mandating preemption of "any and all State law insofar as they may now or hereafter relate to any employee benefit plan described in [and not exempt under]. . . this title"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45–46 (1987) (stating that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'") (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983) ("The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.") (referencing H.R. Conf. Rep. No. 93–1280, at 383 (1974); S. Conf. Rep. No. 93–1090, at 383 (1974)).

62. 42 U.S.C. § 2000e-2(a)(1) (2012).

63. 42 U.S.C. § 12112(a) (2012).

64. *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1081 (1983).

65. See Order Granting in Part and Denying in Part Mot. Summ. J., at 1, *Boyden v. Conlin*, 3:17-cv-00264-wmc (W.D. Wis. Sept. 18, 2018); *Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 771 (N.D. Tex. 2017).

66. 228 F. Supp 3d at 771.

67. *Id.* at 766.

68. *Id.*

69. *Id.* at 768–69.

plaintiff's ERISA claim, recognizing that ERISA did not provide a cause of action for either sex or gender identity discrimination.<sup>70</sup> Nevertheless, the court held that the plaintiff could bring a Title VII claim against her employer challenging the denial of coverage.<sup>71</sup>

The court did not explicitly state that Title VII (or any other federal employment nondiscrimination law, such as the ADA) governed discrimination in employee health benefits. However, it implied such by finding plausible the plaintiff's assertions that her employer

“engaged in intentional gender discrimination in the terms and conditions of [her] employment by denying her a medically necessary procedure based solely on her gender [was] conduct that constitutes a . . . violation of Title VII . . . [that] caused [her] to suffer the loss of pay, *benefits*, and prestige.”<sup>72</sup>

Similarly, in *Boyden v. Conlin*, the Western District Court of Wisconsin held that a state health insurance coverage exclusion of gender-affirming care constituted sex discrimination under Title VII.<sup>73</sup> In that case, transgender state employees challenged the insurance exclusions under Title VII, the Affordable Care Act, and the Equal Protection Clause of the U.S. Constitution.<sup>74</sup> Under both Title VII and the Affordable Care Act, the court held that the exclusions were a “straightforward case of sex discrimination”<sup>75</sup> and that “[e]mployee-sponsored benefits, like the health insurance at issue in this case, are part of an employee’s wages and benefits for purposes of asserting an nondiscrimination claim.”<sup>76</sup>

As these cases demonstrate, federal nondiscrimination laws can govern discrimination in health benefits plans. Arguably, a statutory exception to ERISA’s broad preemption scheme allows for such. ERISA § 1144(d), or § 514(d), provides that the law does not “alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.”<sup>77</sup> Federal courts have interpreted this provision to mean that ERISA does not preempt federal nondiscrimination laws.<sup>78</sup> The Supreme Court has implied as much by holding that ERISA does not preempt certain state laws that provide a means of enforcing commands of respective federal laws — including federal nondiscrimination laws.<sup>79</sup>

70. *Id.* at 769–70.

71. *Id.* at 771.

72. *Id.* (citing *Thompson v. City of Waco, Tex.*, 764 F.3d 500, 503 (5th Cir. 2014) (emphasis in original)).

73. Order Granting in Part and Denying in Part Mot. Summ. J., at 1, *Boyden v. Conlin*, 3:17-cv-00264-wmc (W.D. Wis. Sept. 18, 2018) (also holding that the exclusion constituted sex discrimination under Section 1557 of the Affordable Care Act).

74. *Id.* at 1–2.

75. *Id.* at 26 (quoting *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018) (granting a preliminary injunction for Wisconsin Medicaid recipients challenging an exclusion of gender-affirming care)) (internal quotations omitted).

76. Order Granting in Part and Denying in Part Mot. Summ. J., at 25, *Boyden v. Conlin*, 3:17-cv-00264-wmc (W.D. Wis. Sept. 18, 2018).

77. 29 U.S.C. § 1144(d) (2012).

78. See cases cited *infra* Section IV.C.

79. See *Shaw v. Delta*, 463 U.S. 85, 102 (reasoning that preemption “would frustrate the goal of

In *Shaw v. Delta Airlines*, the Supreme Court suggested that state nondiscrimination laws may avoid ERISA preemption if they “play a significant role in the enforcement of” federal nondiscrimination laws.<sup>80</sup> Specifically, the Court considered whether ERISA would preempt New York’s Human Rights Law, which extended employment protections to pregnant workers.<sup>81</sup> The Court reasoned that based on ERISA § 1144(d), or § 514(d), ERISA should not preempt state laws that contribute to the enforcement of federal laws.<sup>82</sup> In its analysis, the Court explicitly acknowledged the “joint state/federal enforcement” scheme of Title VII: when an employment practice unlawful under Title VII occurs in a state that also prohibits that practice, “the Equal Employment Opportunity Commission (‘EEOC’) refers the charges to the state agency,” and “the EEOC [itself] may not actively process the charges” until the state proceedings have begun.<sup>83</sup> Therefore, preemption of a state nondiscrimination law, which prohibits conduct also unlawful under the federal nondiscrimination law, would “frustrate the goal of encouraging joint state/federal enforcement of Title VII[,]” thereby impairing federal law, in violation of ERISA Section 514(d).<sup>84</sup>

In other words, certain state laws, to the extent that they are analogous to or further the enforcement of federal laws, are not preempted by ERISA. This holding allows federal nondiscrimination laws and state laws that mirror them to operate despite ERISA’s broad preemption scheme. If ERISA were intended to be the only law governing employee benefits plans, this analysis would be impossible — state nondiscrimination laws would certainly not have a place in governing employee health benefits plans if federal nondiscrimination laws like Title VII and the ADA were not intended to do so. Thus, Title VII and the ADA can govern employee health benefits plans despite ERISA’s broad preemption scheme.

As such, transgender individuals seeking protections from nondiscrimination in employee benefits plans can bring legal claims despite ERISA’s lack of nondiscrimination protections, particularly in jurisdictions that both recognize this exception to ERISA and interpret federal civil rights laws to protect people from gender identity or gender dysphoria discrimination in employment, under either Title VII or the ADA, respectively.

#### IV. PROTECTIONS FOR TRANSGENDER EMPLOYEES UNDER TITLE VII AND THE ADA

##### A. Title VII and Sex Discrimination

Title VII prohibits employers from discriminating on the basis of sex, among

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encouraging joint state/federal enforcement of [the law]).

80. *Id.* at 101.

81. *Id.* at 88.

82. *Id.* at 100–03.

83. *Id.* at 102.

84. *Id.* Ultimately, the Court found that the practice made unlawful under the New York Human Rights Law was not unlawful under Title VII. Because enforcement of Title VII “in no way depend[ed]” on extension of “nondiscrimination laws to areas not covered by Title VII,” the Court concluded that “pre-emption would not impair Title VII within the meaning of § 514 (d).” *Id.* at 103. Regardless, this case stands for the proposition that ERISA’s savings clause may help state laws avoid preemption to the extent that they further the enforcement of federal laws.

other characteristics.<sup>85</sup> The Supreme Court has determined that this prohibition on sex discrimination includes discrimination on the basis of sex or gender stereotypes<sup>86</sup> and same-sex sexual harassment.<sup>87</sup> The Supreme Court has not yet determined whether Title VII prohibits discrimination on the basis of gender identity. However, several federal courts, including the First, Sixth, Seventh, Ninth, and Eleventh Circuits, have held that prohibitions on sex discrimination—including Title VII’s prohibition on sex discrimination—encompass discrimination on the basis of gender identity.<sup>88</sup>

Administrative and political shifts have made transgender employment protections even more uncertain. In April 2012, the EEOC first held that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.”<sup>89</sup> In 2014, President Obama issued Executive Order 13672, which prohibited discrimination based on gender identity in federal employment and government contracting.<sup>90</sup> In 2016, the EEOC announced that it “interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity.”<sup>91</sup> The EEOC has “reiterated these positions through recent amicus curiae briefs and litigation”<sup>92</sup> and its Strategic Enforcement Plans.<sup>93</sup> As of December 2018, the EEOC has

85. 42 U.S.C. § 2000e(a)(1) (2012).

86. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) (reasoning that Congress passed Title VII with the intent of “eradicate[ing]” the full range of discrimination resulting from considerations of sex and sex stereotypes).

87. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, (1998) (reasoning that Title VII does not bar “a claim of discrimination ‘because of sex’ merely because the plaintiff and the defendant [. . .] are of the same sex.”).

88. See, e.g., *Rosa v. Park W. Bank Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (using *Price Waterhouse’s* sex-stereotyping analysis to allow a transgender plaintiff to proceed with a sex discrimination claim under the Equal Credit Opportunity Act); *EEOC v. R.G. & D.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (holding that transgender discrimination is sex discrimination under Title IX of the Education Amendments Act of 1962 and the Equal Protection Clause of the U.S. Constitution); *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000) (using *Price Waterhouse’s* sex-stereotyping analysis to hold that a transgender plaintiff stated a claim of sex discrimination under the Gender Motivated Violence Act); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (stating that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination[.]”); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard City., Md.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-cv-375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997); *Wittmer v. Phillips 66 Co.*, No. CV H-17-2188, 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018).

89. *Macy v. Dep’t of Just.*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*9 (Apr. 20, 2012).

90. Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).

91. *What You Should Know About EEOC and the Enforcement Protection for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Sept. 24, 2018).

92. *Id.*

93. See U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2013-2016, <https://www.eeoc.gov/eeoc/plan/sep.cfm>; U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017-2021, <https://www.eeoc.gov/eeoc/plan/sep->

maintained these positions<sup>94</sup> and Executive Order 13672 is still in effect. Therefore, these interpretations still apply to federal employers and employees.<sup>95</sup>

In 2014, then-Attorney General Holder issued a memo to Department of Justice (“DOJ”) attorneys that Title VII prohibited discrimination on the basis of gender identity and transgender status.<sup>96</sup> But in 2017, then-Attorney General Sessions withdrew that memo and instructed DOJ attorneys that Title VII “does not encompass discrimination based on gender identity per se, including transgender status.”<sup>97</sup>

In sum, Title VII’s prohibition on sex discrimination extends to transgender and gender non-conforming individuals employed by or contracting with the federal government and within the federal jurisdictions that have held such.

## B. The ADA and Disability Discrimination

Historically, transgender and other LGBTQI individuals have not turned to the ADA as a source of employment protection. The ADA defines a disability as “a physical or mental impairment that substantially limits one or more major life activities of [an] individual.”<sup>98</sup> Transgender individuals and those with “gender identity disorders” are excluded from this definition,<sup>99</sup> preventing them from pursuing accommodations or remedies for discrimination under the ADA.<sup>100</sup> However, gender dysphoria, which may or may not accompany transgender or

gender nonconforming identities, is not explicitly excluded from the definition of disability.

The term “gender identity disorder” was previously used by mental health professionals to “diagnose” individuals as transgender, implying that there was

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2017.cfm. Both the FY 2013-2016 and the FY 2017-2021 Strategic Enforcement Plans recognize “[p]rotecting [LGBT] people from discrimination based on sex” as an emerging priority and developing issue.

94. See *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, *supra* note 91 (stating that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.”).

95. See *id.*; *Macy v. Dep’t of Just.*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*9 (Apr. 20, 2012). See also Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).

96. Treatment of Transgender Employment Discrimination Claims under Title VII of the Civil Rights Act on 1964, Mem., Office of the Att’y Gen. (Dec. 15, 2014) available at <https://www.justice.gov/file/188671/download>.

97. Revised Treatment of Transgender Employment Discrimination Claims under Title VII of the Civil Rights Act of 1964, Mem., Office of the Att’y Gen. (Oct. 4, 2017) available at <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf> (emphasis added).

98. 42 U.S.C. § 12102(1)(a) (2012).

99. See 42 U.S.C. § 12211(b) (excluding “transvestism, transsexualism, [and] gender identity disorders not resulting from physical impairments” from the definition of “disability”).

100. *Breakthrough: Americans with Disabilities Act Can’t Exclude Gender Dysphoria*, NAT’L CTR. FOR TRANSGENDER EQUALITY (May 22, 2017) <https://transequality.org/blog/breakthrough-americans-with-disabilities-act-can-t-exclude-gender-dysphoria> (stating that “[w]hile some trans people have successfully won cases using *state* disability laws, courts have generally said that the ADA, the *federal* disability law, bars people from suing over anti-trans discrimination.”) (emphasis in original).

something inherently wrong with being transgender.<sup>101</sup> In 2012, the American Psychological Association (“APA”) approved changes to the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) to remove the term “gender identity disorder,” replacing it with the term “gender dysphoria.”<sup>102</sup> This change symbolizes better understanding that being transgender is not a “disorder.” Instead, the emotional distress that can (but does not always)<sup>103</sup> result from a gender identity that is incongruent with one’s sex assigned at birth can contribute to such distress that would meet “criteria for a formal diagnosis that might be classified as a mental disorder.”<sup>104</sup>

Indeed, gender dysphoria can be debilitating or disabling, in that the condition can cause extreme distress.<sup>105</sup> Even a 1993 court recognized that “[g]ender dysphoria is a medically cognizable and diagnosable condition. Those who suffer from the condition surely endure great mental and emotional agony.”<sup>106</sup> Gender dysphoria can “substantially [limit] . . . major life activities [such as] interacting with others, reproducing, and social and occupational functioning.”<sup>107</sup> In some instances, this distress can be alleviated through living and being respected as one’s true gender, undergoing hormone therapies and surgical treatments, or participating in counseling.<sup>108</sup>

In a major victory for transgender people, the District Court for the Eastern District of Pennsylvania became the first federal court to rule that gender dysphoria is a protected condition under the ADA.<sup>109</sup> In *Blatt v. Cabela’s*, the

101. Press Release, GLAAD, The APA Removes “Gender Identity Disorder” From Updated Mental Health Guide (Dec. 3, 2012) (available at <https://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide>).

102. *Id.*

103. SOC, *supra* note 14, at 5 (stating that “[o]nly some gender nonconforming people experience gender dysphoria at some point in their lives.”).

104. *Id.*

105. *See id.* at 5–6 (defining “gender dysphoria” and explaining that “some people experience gender dysphoria at such a level that the distress meets criteria for a formal diagnosis that might be classified as a mental disorder”).

106. *Doe v. Boeing Co.*, 846 P.2d 531, 535–36 (Wash. 1993) (citing Richard Green, *Spelling “Relief” for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL’Y REV. 125 (1985)). In that case, the Washington Court of Appeals declared gender dysphoria a handicap as a matter of law. *Doe v. Boeing Co.*, 823 P.2d at 1159, 1162–63 (Wash. App. 1992), *rev’d* 846 P.2d 531 (Wash. 1993). The court reasoned that the employee presented “a medically cognizable condition with a prescribed course of treatment.” *Id.* at 1163. The court then found that the employer had allowed the employee to dress in unisex clothing, but that “[a]llowing [the employee] to dress in a unisex fashion did not constitute an accommodation of her medically-documented need to dress in feminine attire.” *Id.* at 1164. On appeal, the Supreme Court of Washington reversed. *Doe*, 846 P.2d at 534. The court acknowledged that gender dysphoria was a medically cognizable condition but reasoned that “unless a plaintiff can prove he or she was discriminated against *because of the abnormal condition*, his or her condition is not a ‘handicap’ for purposes of the [state law].” *Id.* at 536 (emphasis in original). Under the Washington law, the definition of “handicap” required “both (1) the presence of an abnormal condition, and (2) employer discrimination against the employee plaintiff *because of that condition.*” *Id.*

107. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at \*2 (E.D. Pa. May 18, 2017).

108. SOC, *supra* note 14, at 8–10.

109. *See Blatt*, 2017 WL 2178123, at \*2.

plaintiff-employee was fired after a pattern of harassment that began after “she requested a female nametag and uniform and use of the female restroom as accommodations for her disability,” gender dysphoria.<sup>110</sup> Cabela’s moved to dismiss, arguing that the ADA excluded gender identity disorders from coverage.<sup>111</sup>

The court reasoned that the exclusions under the ADA’s disability definition fall into two categories: “non-disabling conditions that concern sexual orientation or identity, and second, disabling conditions that are associated with harmful or illegal conduct.”<sup>112</sup> The court continued:

If the term gender identity disorders were understood, as Cabela’s suggests, to encompass disabling conditions such as Blatt’s gender dysphoria, then the term would occupy an anomalous place in the statute, as it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct. But under the alternative, narrower interpretation of the term, this anomaly would be resolved, as the term gender identity disorders would belong to the first category described above.<sup>113</sup>

Deciding “to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender,” the court concluded that this interpretation does not “exclude from ADA coverage disabling conditions that persons who identify with a different gender may have — such as Blatt’s gender dysphoria, which substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning.”<sup>114</sup> Thus, the court held that gender dysphoria was not excluded from the ADA’s definition of disability under § 12211.<sup>115</sup>

The court’s ruling in *Blatt* allows transgender or non-binary people with gender dysphoria to assert valid ADA discrimination claims within that jurisdiction. Further, it opens the door for other federal courts to interpret the ADA similarly and could allow transgender or non-binary employees with gender dysphoria to bring claims of discrimination in the provision of employee health benefits plans.

### C. Where to Secure Coverage for Gender-Affirming Care

Jurisdictions that have applied *Shaw*’s reasoning that ERISA does not supersede other federal nondiscrimination law and have also recognized protections for transgender people under federal civil rights laws will likely

protect transgender employees from discrimination in employee health benefits plans by allowing Title VII or the ADA claims to avoid ERISA preemption.

The First, Second, Sixth, and Ninth Circuits have applied the principles of *Shaw* to save state laws that enforce other federal nondiscrimination laws, such as

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110. *Id.* at \*4.

111. *Id.* at \*1–2.

112. *Id.* at \*3.

113. *Id.*

114. *Id.* at \*4.

115. *Id.*

the ADA and the Age Discrimination in Employment Act (“ADEA”), from ERISA preemption.<sup>116</sup> These decisions indicate these jurisdictions’ recognition that federal nondiscrimination laws govern discrimination in health benefits despite the broad preemption scheme of ERISA.

In 1999, the Second Circuit Court of Appeals held that a state law avoided preemption “precisely to the extent that its protections track[ed] those of the ADEA.”<sup>117</sup> In *Devlin v. Transportation Communications International Union*, the defendant-employer amended its “welfare-benefit plan provided to retired employees . . . to require the retirees to pay \$100 per month for their medical benefits” and left active employee benefits alone.<sup>118</sup> The plaintiff-retirees claimed that this change violated the New York Human Rights Law’s prohibition on age discrimination.<sup>119</sup> Because the state law protections mirrored those of the federal nondiscrimination law, ERISA did not preempt the state law age discrimination claims.<sup>120</sup>

In 2000, the First Circuit Court of Appeals stated that state law claims that target conduct unlawful under the ADA “would be exempt from ERISA preemption.”<sup>121</sup> In *Tompkins v. United Healthcare of New England Inc.*, the parents of the child with a chromosomal disease, who received insurance through their employer, were denied coverage for the treatment of the child.<sup>122</sup> The parents sued the insurance company, claiming that the denial of benefits for the treatment of their child violated the ADA and state nondiscrimination laws<sup>123</sup> and that the state laws were part of the ADA’s enforcement scheme.<sup>124</sup> The First Circuit held that because federal laws like the ADA and Title VII “contemplate[.]” that “state laws will contribute to the overall federal enforcement regime,” state law claims are

exempt from ERISA preemption when those state laws address conduct unlawful under federal nondiscrimination laws.<sup>125</sup>

In 2008, the Ninth Circuit Court of Appeals held that ERISA preempted a

116. The Fifth, Eighth, and Eleventh Circuits have not used the principles of *Shaw* to save state nondiscrimination laws from ERISA preemption, but instead have used *Shaw* to save from ERISA preemption state laws that further the enforcement of federal bankruptcy law. See *In re Schlein*, 8 F.3d 745, 751–54 (11th Cir. 1993) (holding that ERISA does not preempt “state law pension plan exemptions relied upon by debtors in federal bankruptcy cases.”); see also *In re Vickers*, 954 F.2d 1426, 1429 (8th Cir. 1992) (holding “that ERISA does not preempt the Missouri exemption statute [that] permits debtors to exempt reasonably necessary pension benefits.”); *In re Dyke*, 943 F.2d 1435, 1450 (5th Cir. 1991) (holding that ERISA did not preempt Texas law enforcing the federal Bankruptcy Code). The Tenth Circuit has considered applying this exception to rulings by state agencies. See *Nat’l Elevator Indus., Inc. v. Calhoon*, 957 F.2d 1555, 1557 (10th Cir. 1992). The Third, Fourth and Seventh Circuits have either not had the opportunity to address this issue or otherwise do not recognize this exemption.

117. 173 F.3d 94, 100 (2d Cir. 1999).

118. *Id.* at 96–97.

119. *Id.* at 96–98.

120. *Id.* at 100.

121. *Tompkins v. United Healthcare of New Eng., Inc.*, 203 F.3d 90, 97 (1st Cir. 2000).

122. *Id.* at 92–93.

123. *Id.* at 93.

124. *Id.* at 96.

125. *Id.* at 96–97.

state law that prohibited conduct that the ADEA did not.<sup>126</sup> In *Hurlic v. Southern California Gas Co.*, the court reasoned that because the law outlawed conduct beyond what the ADEA covered, preemption of the state law would not “‘impair’ the joint state/federal enforcement scheme of the ADEA.”<sup>127</sup> Thus, the court held that ERISA preempted the state law claim.<sup>128</sup>

In 2012, the Sixth Circuit held that ERISA did not preempt a state law claim that mirrored an ADEA claim.<sup>129</sup> In *Loffredo v. Daimler AG*, former company executives were denied benefits under the company’s retirement plan when the company went bankrupt.<sup>130</sup> The plaintiffs made several state law claims, including claims of age discrimination.<sup>131</sup> The court reasoned that the plaintiff’s state-law age discrimination claim mirrored an ADEA claim, thus saving the state law claim from ERISA preemption.<sup>132</sup>

Federal district courts have also held that state statutory claims that target unlawful conduct under federal nondiscrimination laws are exempt from ERISA preemption.<sup>133</sup> These decisions allow laws like Title VII and the ADA govern claims of discrimination in health benefits despite the broad preemption scheme of ERISA.

Out of these circuit courts, all but the Second Circuit have allowed transgender plaintiffs to bring sex discrimination claims.<sup>134</sup> Although the Second Circuit has yet to consider a claim of gender identity discrimination as sex discrimination, the court has held that sex discrimination under Title VII includes

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126. *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1037 (9th Cir. 2008).

127. *Id.*

128. *Id.*

129. *Loffredo v. Daimler AG*, 500 F. App’x 491, 498 (6th Cir. 2012).

130. *Id.* at 493.

131. *Id.* at 494.

132. *Id.* at 498.

133. *See, e.g., Tompkins*, 203 F.3d at 97 (finding that state statutory claims that target “conduct unlawful under the ADA . . . would be exempt from ERISA preemption . . .”); *see also Sanders v. Amerimed, Inc.*, 17 F. Supp. 3d 700, 706 (S.D. Ohio 2014) (interpreting *Shaw* to provide that “Section 514(a) will not preempt state antidiscrimination laws to the extent that they prohibit practices made unlawful by Title VII” and that “[c]laims brought under state statutes that would otherwise be preempted by ERISA remain fully enforceable to supplement ERISA to the extent that the state statutes track federal anti-discrimination law.”); *James v. Fed. Res. Bank of N.Y.*, 471 F. Supp. 2d 226, 236 (E.D.N.Y. 2007) (ruling that claims under the state law at issue were preempted to the extent that the law was not necessary to the enforcement of federal nondiscrimination laws); *Jorgensen v. Mass. Mut. Life Ins. Co.*, No. 99CV30172, 2001 WL 1736636, at \*8 (D. Mass. Nov. 27, 2001) (stating that “[i]t is true that some state law claims are exempt from ERISA preemption if they are a necessary part of a federal enforcement scheme under statutes like Title VII or the ADA.”); *Saks v. Franklin Covey Co.*, 117 F. Supp. 318, 330 (S.D.N.Y. 2000) (ruling that claims under the state law at issue were preempted to the extent that the law was “not coincident with Title VII and the ADA . . .”); *Bennett v. Hallmark Cards Inc.*, No. 92-1073-CV-W-6, 1993 WL 327842, at \*4 (W.D.M.S. Aug. 17, 1993) (stating that “[s]tate law which prohibits conduct that is lawful under Title VII is not saved by § 1144(d) because preemption would not impair Title VII.”).

134. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000).

discrimination on the basis of sexual orientation.<sup>135</sup> Further, at least two district courts within the Second Circuit have held that gender identity discrimination is sex discrimination.<sup>136</sup> Together, these decisions could mean that employees may be successful in bringing discrimination claims in the Second Circuit's jurisdiction against employers whose benefits plans discriminate on the basis of gender identity. In the meantime, because the First, Sixth, and Ninth circuits recognize gender identity discrimination as sex discrimination and recognize the *Shaw* exemption to ERISA preemption, transgender or non-binary employees in these jurisdictions will likely be successful in bringing Title VII sex discrimination claims for discrimination in a health benefits plan.

As for ADA claims, the only court that has recognized gender dysphoria as a disability distinct from transgender status is a district court within the Third Circuit,<sup>137</sup> and the Third Circuit has not considered the question of ERISA's preemption of federal nondiscrimination laws. Nevertheless, the federal district court within the Third Circuit that recognized gender dysphoria as a disability under the ADA has done so.<sup>138</sup> Therefore, at least in the District Court for the Eastern District of Pennsylvania, transgender or non-binary employees may be successful in bringing ADA disability discrimination claims for discrimination in a health benefits plan.

Thus, if the Affordable Care Act or the regulations interpreting its nondiscrimination provisions to include gender identity are repealed, these jurisdictions are the best options for transgender or non-binary employees seeking coverage for gender-affirming care under their employee health benefits plans to bring claims.

## V. CONCLUSION

Attempts to repeal the Affordable Care Act and a potential rule that would interpret the Affordable Care Act's sex discrimination provision to exclude protections for transgender people have put transgender people at risk of being denied gender-affirming care. If that happens, legal advocates will need to use Title VII and the Americans with Disabilities Act to overcome ERISA preemption. Otherwise, ERISA's lack of nondiscrimination provisions will leave transgender employees without protection from discrimination in health benefit plans.

Because of the Supreme Court's decision in *Shaw v. Delta Airlines* and subsequent lower federal courts' application of *Shaw* to save from ERISA preemption state nondiscrimination laws that mirror federal nondiscrimination laws, federal nondiscrimination laws play an important role in regulating discrimination in employee health benefits plans. Advocates will secure the best protections in jurisdictions that have held or implied that ERISA does not supersede other federal laws and that have also recognized protections for

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135. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

136. *See, e.g., Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *see also Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-cv-375E, 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003).

137. *See Blatt v. Cabela's Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017).

138. *See Esfahani v. Med. Coll. of Pa.*, 919 F. Supp. 832, 837 (E.D. Pa. 1996) (declining to dismiss a claim that ERISA did not preempt a disability discrimination claim under the Pennsylvania Human Rights Act).

transgender employees under federal nondiscrimination laws. These laws will help ensure that the transgender community receives protection from discrimination in the provision of health benefits and insurance coverage for gender-affirming care despite political and administrative shifts.