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Legal Sidebar

Fourth Circuit Holds That Certain Medicaid and State-Funded Health Plans Discriminate by Refusing to Cover Treatments for Gender Dysphoria

Updated August 23, 2024

States have recently considered the extent to which transgender individuals should have access to certain medical treatments to address a discordance between a person's sex characteristics and gender identity. While some states have enacted legislation ensuring that such services are available to transgender people, other states have policies restricting access to or otherwise limiting health coverage for them. Some of these restrictions are specific to minors, but others cover adults as well. For example, the West Virginia Medicaid program includes a blanket coverage exclusion for "transsexual surgery," and North Carolina's State Health Plan for Teachers and State Employees (NCSHP) categorically excludes coverage for treatments "leading to or in connection with sex changes or modifications." The West Virginia Medicaid and NCSHP coverage exclusions, as well as other similar Medicaid, state, and private health insurance coverage policies, have been challenged in federal court on the basis that the exclusions constitute sex discrimination in violation of the Fourteenth Amendment's Equal Protection Clause and Section 1557 of the Patient Protection and Affordable Care Act (Section 1557), among other claims.

Federal courts across the country considering similar coverage exclusions have arrived at different conclusions. For example, a Wisconsin federal district court held that the state health plan's exclusion of coverage for "surgery and sex hormones associated with gender reassignment" violated the Equal Protection Clause and Section 1557. With respect to Medicaid coverage, the Northern District of Florida held that a state law banning Medicaid reimbursements for "sex reassignment prescriptions or procedures" violated the Equal Protection Clause and Section 1557, among other federal laws. The Supreme Court is scheduled to hear *United States v. Skrmetti* in the October 2024 term, which asks whether state restrictions on certain medical treatments for gender dysphoria in minors are constitutional.

Against this backdrop, the Fourth Circuit, sitting *en banc* (i.e., with all of the active judges on the circuit), considered consolidated cases (*Kadel v. Folwell* and *Fain v. Crouch*) to determine whether North Carolina's and West Virginia's policies, respectively, violated federal law. The consolidated case proceeded under the name *Kadel v. Folwell*. On April 29, 2024, the court affirmed the earlier panel

Congressional Research Service
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LSB11092

decisions, in an 8–6 vote, that both the West Virginia and North Carolina plans were subject to, and did not survive, heightened scrutiny under the Equal Protection Clause. The court also affirmed that the West Virginia plan violated Section 1557. The Fourth Circuit is the first appellate court to issue a final ruling on the legality of state health insurance coverage exclusions for certain treatments for gender dysphoria. North Carolina and West Virginia have filed petitions for certiorari, seeking review of the decision by the Supreme Court. This Sidebar discusses the approach taken by the Fourth Circuit with respect to the challenges brought under the Equal Protection Clause and Section 1557.

Legal Background

Equal Protection

The Equal Protection Clause provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has held that the Equal Protection Clause requires that "similarly situated people should be treated alike." To withstand equal protection scrutiny, government classifications must be supported by constitutionally sufficient justifications—in other words, the government must present a valid reason for treating people differently. The strength of the justification required depends on the type of classification made by the law. "Rational basis" scrutiny applies to most laws. It requires only that the government's justification be "rationally related to a legitimate state interest." This is typically a low bar, and most laws pass rational-basis scrutiny. A much more exacting standard—strict scrutiny—applies to government action that distributes burdens or benefits based on race, ethnicity, or national origin—classifications courts refer to as "suspect." To pass strict scrutiny review, a government measure must be narrowly tailored to serve a compelling government interest. Most laws subject to strict scrutiny do not survive the analysis.

Some government classifications are reviewed using a standard in between rational basis and strict scrutiny. The Supreme Court has called sex-based classifications "quasi-suspect" because they are often based upon "outdated misconceptions" or "loose-fitting characterizations" of the abilities of men and women. In *Grimm v. Gloucester County*, the Fourth Circuit held that classifications based on gender identity are both sex-based and quasi-suspect in their own right. Circuit courts are currently split over this topic. Quasi-suspect classifications are subject to "intermediate scrutiny," under which the government must show that the law is "substantially related" to an "important government interest." While this standard is considered easier to meet than strict scrutiny, it requires a significantly more substantial justification than rational-basis scrutiny.

Laws that do not expressly discriminate against a protected classification are generally "facially neutral." However, courts may find that an apparently neutral classification is a proxy for a protected characteristic. "Proxy discrimination" occurs when a law discriminates based on a characteristic that is not suspect or quasi-suspect on its face but is so closely aligned with protected characteristics that a court determines that the law is in fact discriminating on the basis of that protected characteristic. Thus, a law that would be subject to rational-basis scrutiny at first glance may instead face a higher standard of review. For example, in *Rice v. Cayetano*, the Supreme Court struck down a Hawaiian constitutional provision that restricted voting in certain elections to people who were descended from Hawaiian inhabitants on or before 1778, all of whom were Polynesian. The Court held that in that case, ancestry was a proxy for race.

Section 1557

Section 1557 contains various antidiscrimination requirements that apply to certain health programs or activities. The statute provides that a person "shall not . . . be subjected to discrimination under[] any health program or activity, any part of which is receiving Federal financial assistance . . ." and

incorporates by reference Title IX of the Education Amendments of 1972's prohibition on sex discrimination. The 2024 rule implementing Section 1557 defines a "health program or activity" as including, among other things, an entity that provides health insurance coverage.

HHS's 2024 rulemaking refers to the Supreme Court's 2020 ruling in *Bostock v. Clayton County* to support its position that Section 1557's prohibition on sex discrimination includes sexual orientation and gender identity discrimination. The Court in *Bostock* held that a provision in Title VII of the Civil Rights Act of 1964 prohibiting discrimination in the workplace "because of . . . sex" forbids employers from making employment decisions based on an employee's sexual orientation or gender identity. The Biden Administration has taken the view that *Bostock*'s reasoning applies to other federal statutes addressing sex discrimination. (For more discussion, see this CRS report.)

Several states have sued the Biden Administration on the grounds that HHS's Section 1557 rule exceeds the agency's authority under the statute. On July 3, 2024, three district courts issued preliminary rulings, all enjoining the rule and finding that the states were likely to succeed on their claims that it exceeds HHS's authority under the statute. While the injunctions differed in scope (one ruling granted a nationwide injunction while the other two injunctions together stayed the application of all aspects of the rule in three states), all have the effect of stopping HHS from implementing or otherwise enforcing the new rule.

En Banc Fourth Circuit Decision in *Kadel v. Folwell*

On April 29, 2024, a divided Fourth Circuit issued an opinion in *Kadel* affirming that states may violate the Equal Protection Clause and Section 1557 if they exclude coverage for certain treatments for gender dysphoria from state health insurance programs. The 8–6 opinion drew three separate dissents, the principal of which was authored by Judge Richardson. The majority and Judge Richardson's dissent disagreed over how to determine if a classification in an ostensibly facially neutral policy is proxy discrimination. The judges also disagreed as to whether coverage exclusions based on gender dysphoria discriminate on the basis of sex or gender identity.

The Majority

In order to determine the appropriate level of scrutiny to apply, the majority began its analysis by determining whether gender dysphoria is a proxy for transgender identity, which the circuit has held to be a quasi-suspect classification. The court held that the plans used the diagnosis of "gender dysphoria" as an "obvious" proxy for transgender status, reasoning that "gender dysphoria is so intimately related to transgender status as to be virtually indistinguishable from it." The majority explained that a proxy that clearly targets a protected group is not facially neutral, but rather discriminatory on its face. The majority also found that the coverage exclusion was "textbook sex discrimination" because it relied upon a patient's biological sex and was premised on "gender stereotypes about how men or women should present."

The majority distinguished the coverage exclusions from the disability insurance system at issue in *Geduldig v. Aiello*, which the states argued supported their position that the exclusions need only satisfy rational basis review. In *Geduldig*, the Supreme Court held that an employee disability insurance plan that excluded coverage for pregnancy-related conditions did not discriminate against women and was therefore subject to rational basis scrutiny. While stating "it is true that only women can become pregnant," the Court reasoned that the class of nonpregnant people includes both women and men and that under the terms of the plan, "there is no risk from which women are protected and men are not." The Court reasoned that even though "only women can become pregnant[,]" pregnancy is an "objectively identifiable physical condition[.]" The majority in *Kadel* held that gender dysphoria is different because it

is *not* objectively identifiable without reference to the patient's sex and gender identity. Thus, the Fourth Circuit held that *Geduldig* "is best understood as standing for the simple proposition that pregnancy is an insufficiently close proxy for sex."

After determining that the West Virginia and North Carolina health plans discriminated on the basis of both gender identity and sex, the Fourth Circuit applied intermediate scrutiny. The states asserted interests in controlling costs and protecting their plan participants from medically ineffective treatments. The court held that these justifications were not sufficient to show an important state interest. The court reiterated Supreme Court precedent that states "may not protect the public fisc by drawing an invidious distinction between classes of citizens," and it held that the states did not present adequate evidence that treatments for gender dysphoria were ineffective.

The majority also affirmed that the challenged plans violated Section 1557 because, it held, that law prohibits gender identity discrimination. While West Virginia argued that "sex" under Title IX has historically referred to the "binary sex," the majority underscored that *Bostock* held that disparate treatment based on gender identity and sexual orientation is sex discrimination, even applying the same assumption. *Bostock*'s reasoning, the court concluded, applied to Title IX and therefore to Section 1557.

Dissent

In the principal dissent (and the only dissent to discuss the equal protection analysis), Judge Richardson disagreed that the coverage exclusions discriminated by proxy on the basis of gender identity or sex. Judge Richardson opined that the majority erred in finding facial discrimination without conducting a more thorough inquiry to determine whether the exclusions were driven by discriminatory intent. In the dissent's view, a court can find facial discrimination by proxy only when "the law overwhelmingly affects a suspect class and . . . there's no logical reason for the distinction other than targeting that suspect class." Absent this showing, the dissent argued, a court must make an evidentiary inquiry to determine whether the law uses a proxy to intentionally discriminate against a protected group. Thus, Judge Richardson concluded, because there was no evidence of animus, the plans should be subject to rational basis scrutiny.

Judge Richardson also disagreed with the majority's analysis of *Geduldig*. He argued that under *Geduldig*, a coverage exclusion cannot be said to discriminate against a protected group, even where that group is largely or exclusively impacted by insurance coverage exclusions, if "the plan provides equal risk coverage for all persons." Judge Richardson would have held that the West Virginia and North Carolina plans were not facially discriminatory because the exclusions apply to all members regardless of sex or gender identity. Therefore, the dissent reiterated that rational basis was the appropriate level of scrutiny, and the state's justifications of cost savings satisfied this standard.

Considerations for Congress

States and courts have taken different approaches to insurance coverage for medical care to treat gender dysphoria. As a result, a transgender individual's ability to access certain medical care may depend on their state of residence and coverage type. For example, absent direction from the Supreme Court, states in the Fourth Circuit may need to cover certain treatments for gender dysphoria in Medicaid and other state health insurance plans, while such services may not be covered elsewhere in the United States.

West Virginia and North Carolina have filed petitions for certiorari to appeal the Fourth Circuit's ruling in *Kadel* to the Supreme Court. In the coming months, the Supreme Court will decide whether or not to hear *Kadel*. The Court is already set to hear oral arguments during its fall 2024 term in *United States v. Skrmetti*, a case challenging state laws prohibiting minors from receiving some medical treatments for gender dysphoria. While the question presented by *Skrmetti* is limited to minors, if the Supreme Court

grants certiorari in *Kadel*, it would provide an opportunity for the Court to address the level of scrutiny applicable to classifications based on the diagnosis of gender dysphoria in adults. *Kadel* presents the question of whether a coverage exclusion for treatments for gender dysphoria is sex discrimination or a proxy for discrimination based on gender identity. If the Court finds this to be the case, it would have an opportunity to decide whether distinctions based on gender identity are subject to heightened scrutiny, either as sex-based discrimination or as quasi-suspect in their own right.

The level of scrutiny applied to classifications on the basis of gender dysphoria or gender identity would have implications in contexts beyond the regulation of medical care. It could affect, for example, policies regulating how transgender people may participate in sex-differentiated athletics. If the Court takes up *Kadel* and rules on the merits of the Equal Protection issue, the level of scrutiny the Court applies would also affect Congress's ability to legislate in this area. If the Court finds that rational-basis scrutiny applies to gender-dysphoria- or gender-identity-based distinctions, Congress would have more room to take action that distinguishes on these bases. On the other hand, if the Court applies heightened scrutiny, Congress would have to show that any law that draws distinctions on the basis of gender dysphoria or gender identity is substantially related to an important government interest. If no decision is made by the Court regarding the applicable level of scrutiny, the standard applied to a challenged statute will continue to depend on the controlling law in each jurisdiction.

With respect to Section 1557, HHS's 2024 rules clarify how the agency interprets the statute in light of *Bostock*, but the rule has been preliminarily enjoined by federal district courts. Litigation over the rule's validity continues. If the Supreme Court grants certiorari to review *Kadel*, the Court could weigh in on the meaning of Section 1557 and clarify its applicability to treatments for gender dysphoria. Congress can also specify whether Section 1557 prohibits discrimination on the basis of sexual orientation and gender identity. Similarly, Congress could amend the Medicaid statute to clarify whether and which treatments for gender dysphoria should be covered, or it could direct the Secretary of HHS to undertake rulemaking to this effect. Congress could also amend Title IX to define whether its prohibition on sex-based discrimination includes sexual orientation and gender identity discrimination.

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