Discrimination based on sexual orientation and gender identity (SOGI) negatively affects the health of sexual and gender minority (SGM) people (people who identify as LGBTQIA+) and functions as a barrier to care.\(^1\) The Obama administration put in place federal regulations prohibiting SOGI discrimination in health care, based on an evolving understanding of sex discrimination,\(^2\) which was referenced in the 2010 Affordable Care Act (ACA). One of these regulations, interpreting Section 1557 of the ACA, was then challenged in federal court. Some protections, including gender identity nondiscrimination, were enjoined, which means that the court prohibited the federal government from implementing them.\(^3\) The Trump administration subsequently attempted to dismantle federal SOGI nondiscrimination protections. These Trump administration actions are now being challenged in federal court, including by the employer of 2 of the coauthors of this article, Fenway Health. Subsequently, the Biden administration announced its intention to enforce protections against SOGI discrimination, relying on the 2020 US Supreme Court ruling in \textit{Bostock v Clayton County, GA}, which stated that anti-gay and anti-transgender employment discrimination violates federal sex nondiscrimination laws.

Section 1557 of the ACA prohibits discrimination in any health program or activity receiving federal funding consistent with federal law. It references 4 civil rights laws, including Title IX of the Education Amendments of 1972, which prohibits sex discrimination. In 2016, the US Department of Health and Human Services (HHS) issued an implementing rule prohibiting health care discrimination on the basis of gender identity—including against intersex and nonbinary people. Health plans were thereby prohibited from refusing to cover care owing to a person’s gender identity.\(^4\)

The 2016 rule also expressly prohibited sex stereotyping, which encompasses some forms of sexual orientation discrimination. In 2016, the HHS Office for Civil Rights (OCR)\(^5\) stated that it would “evaluate complaints alleging sex discrimination related to an individual’s sexual orientation to determine whether they can be addressed under Section 1557.” The OCR reasoned that as a policy matter, sexual orientation discrimination should be prohibited in health programs and activities. However, because federal case law at the time was mixed, the agency opted to let the case law evolve before promulgating more explicit protections. Case law has since evolved, culminating in the landmark 6-3 \textit{Bostock} ruling in 2020.\(^6\)

The 2016 ACA nondiscrimination rule was quickly challenged by religious health entities and a handful of states. Parts of the rule, including defining sex discrimination to include gender identity and termination of pregnancy, were enjoined and eventually vacated (ie, annulled, or rendered void) by a Texas federal district court in \textit{Franciscan Alliance v Burwell}.\(^4\) This decision, however, does not mean that transgender people have no protections. The right to private action—to sue a health care entity in court for discrimination—remains, as does the inclusion of “sex” in the ACA’s nondiscrimination provision. Federal district courts in Wisconsin, Minnesota, and California ruled in 2017 and 2018 that the statutory nondiscrimination provision of the ACA prohibited anti-transgender discrimination, regardless of the status of the HHS’s implementing rule.\(^3\) Private and public insurance coverage of transgender health care needs\(^7\) and patient SOGI data collection in electronic health records\(^8\) also expanded since 2016, despite the Trump administration’s anti-LGBTQIA+ policies.

Starting in 2017, the Trump administration took a number of steps to further undermine the ACA nondiscrimination rule, including refusing to defend it in federal court and reversing the interpretation of sex discrimination to exclude gender identity discrimination. It also expanded religious refusal policies that allow discrimination in health care and social services based on religious
or moral belief. In June 2020, the Trump administration finalized a rule which deleted the 2016 ACA rule definition of sex discrimination that included gender identity and sex stereotyping. It also rescinded 6 explicit SOGI nondiscrimination regulations governing health insurance exchanges, qualified health plans, Medicaid, and the programs of all-inclusive care for the elderly.

Just days after the Trump administration issued its final rule, but before the rule was published in the Federal Register, the US Supreme Court issued a landmark ruling in Bostock, with the exact opposite interpretation of federal sex discrimination laws. Justice Neil Gorsuch wrote for a 6-3 majority that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” Such discrimination in employment therefore violates the Title VII prohibition on sex discrimination.

Several organizations, including Fenway Health, sued the Trump administration to stop implementation of its revised discrimination rule, citing the Bostock ruling in their lawsuits. As a result of 2 such lawsuits, federal courts issued preliminary injunctions against parts of the 2020 rule, including an injunction to halt the repeal of protections based on sex stereotyping (which encompasses some forms of sexual orientation discrimination). At present, the Trump administration’s rule remains largely in effect.

The Biden administration has taken steps to protect SGM people against SOGI discrimination in health care and other contexts, including an executive order requiring federal agencies to ensure that their regulations conform to Bostock’s interpretation of sex discrimination to include SOGI. Several federal agencies, including the HHS Office of Civil Rights, the Department of Justice, and the Department of Education, have issued guidance stating that SOGI discrimination violates federal law.

It is important to note that HHS has not made official changes to its Section 1557 regulations, and many of the changes that have diminished protections remain essentially in effect. For example, in August 2021, the US District Court for the Northern District of Texas permanently enjoined HHS from forcing the plaintiffs in Franciscan Alliance v Becerra “to perform or provide insurance coverage for gender-transition procedures or abortions.” However, HHS has not announced its intent to restore other provisions of the 2016 ACA nondiscrimination rule rescinded by the Trump administration’s 2020 rule, such as carve-outs of health insurers as covered entities and protections for patients not proficient in English or who have terminated a pregnancy. Further action from HHS is needed to restore these protections, and litigation challenging the 2020 rule remains ongoing.

We urge the Biden administration to take additional steps, such as requiring the collection and reporting of SOGI data in COVID-19 testing, care, and vaccination, and ensuring that SGM federal employees can access fertility assistance and gender-affirming care. The administration’s actions in support of SOGI nondiscrimination in health care are especially important now that states are considering and passing laws that allow religious refusal of care provision, as Arkansas did in March 2021, and laws banning gender-affirming medical care for minors and restricting transgender rights more broadly. While executive orders and subregulatory notices are important, these can be rescinded by a less supportive administration. Therefore, the 2020 Rule should be formally rescinded, and the US Senate must pass the Equality Act, which prohibits SOGI discrimination in several contexts, including health care. There have been many recent shifts in federal SOGI nondiscrimination policy. Despite the Trump administration’s rollback of protections, the Biden administration, the courts, and federal agencies, at least for now, have begun to move in a direction more supportive of SGM equality and health equity.

ARTICLE INFORMATION

Open Access: This is an open access article distributed under the terms of the CC-BY License. © 2022 Cahill S et al. JAMA Health Forum.
Corresponding Author: Sean Cahill, PhD, Director of Health Policy Research, The Fenway Institute, 126 Brookline, 1340 Boylston St, Boston, MA 02215 (scahill@fenwayhealth.org).

Author Affiliations: Health Policy Research, The Fenway Institute (Cahill); Department of Health Sciences, Bouve College of Health Sciences, Northeastern University, Boston, Massachusetts (Cahill); Harvard Medical School (Miller); John D. Stoeckle Center for Primary Care Innovation, Massachusetts General Hospital, Boston (Miller); The National LGBTQIA+ Health Education Center at The Fenway Institute (Keuroghlian); Department of Psychiatry, Harvard Medical School, Boston, Massachusetts (Keuroghlian).

Conflict of Interest Disclosures: Dr Keuroghlian reported personal fees from McGraw Hill. No other disclosures were reported.

Disclaimer: The views expressed in this article reflect the opinions and analyses of the authors, and do not represent the views of Fenway Health.

REFERENCES