

Transgender People Face New Legal Fight After Supreme Court Victory

Though the Supreme Court embraced a broad definition of sex in June, the Department of Health and Human Services pressed ahead with changes that narrowed the definition of sex in the Affordable Care Act.

Alisha Haridasani Gupta

- Sept. 3, 2020

“To go to the hospital and be mistreated — it’s violence.”

— *Tanya Asapansa-Johnson Walker, one of two transgender women who are suing the Trump administration*

In Her Words is available as a newsletter. [Sign up here to get it delivered to your inbox.](#)

About two months ago, the U.S. Supreme Court determined in a landmark ruling that protections in the Civil Rights Act against discrimination in the workplace “on the basis of sex” extend to [gay and transgender people, too](#).

But just three days before that ruling, amid a raging pandemic, the Department of Health and Human Services erased provisions in the Affordable Care Act, also known as Obamacare, about sex discrimination that included gender identity and [defined sex as the biological male-female binary assigned at birth](#).

In other words, as the Supreme Court essentially broadened the definition of sex, the Trump administration had narrowed it.

That the two contradictory developments came so close to each other was most likely not a coincidence: The Department of Health and Human Services acknowledged in its published rules that the Supreme Court would soon make an important ruling in a pair of cases (*Bostock v. Clayton County, Ga.* and *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*) that could have an impact on its actions. But the agency went on to say that it “need not delay a rule based on speculation as to what the Supreme Court might say.”

“The timing might even suggest to a cynic that the agency pushed ahead specifically to avoid having to address an adverse decision,” [noted one federal judge, Frederic Block](#).

Days after the Supreme Court decision, the health department formally published its modified rules, which raised the question: Is the Trump administration’s decision to erase Obama-era protections for gay and transgender patients now illegal?

That question is at the heart of a lawsuit brought by two transgender women in New York — Tanya Asapansa-Johnson Walker, 57, and Cecilia Gentili, 48 — against the Department of Health and Human Services.

“The government failed to take into account the implications of the Supreme Court decision,” said Jason Starr, director of litigation at the Human Rights Campaign, a nonprofit that is representing both Ms. Walker and Ms. Gentili. “That makes this rule unlawful.”

A Lifetime of ‘Violence’

In addition to interviews with The Times, the more than 30 pages of personal statements submitted by [Ms. Gentili](#) and [Ms. Walker](#) as part of the lawsuit paint a harrowing picture of the systemic discrimination trans people face when trying to access health care.

Both women are prominent activists in the L.G.B.T.Q. community. Ms. Walker, an Army veteran, is the co-founder of the New York Transgender Advocacy Group, or NYTAG, and Ms. Gentili, is a consultant helping businesses with transgender sensitivity and inclusion issues. She has also appeared in a few episodes of the award-winning TV series “Pose.”

Over their lifetimes, they have had consistently negative experiences at the hands of medical professionals. Both have been told that their gender identity was a psychological condition that could be treated (Ms. Walker was even given medication for schizophrenia), both have been misgendered, both have been called by the names assigned to them at birth rather than the ones they have chosen, and they have endured being mocked and denied care — all of which, they said, had made them wary of seeking health care.

“Trans people, because of all of our past experiences, do not go and access medical services when we need it,” Ms. Gentili explained in the interview.

The dangers of that are amplified during a pandemic, she added. “My [best friend, who is also trans, just died of Covid-19](#). She was sick for more than a week, and she chose not to go and see a doctor.”

Once, in 2001, Ms. Gentili was suffering from intense stomach pains and went to see a doctor. The doctor started touching around her stomach as part of the checkup and asked her to slightly pull down her clothes, she recalled.

“When I did that, part of my genitalia became visible,” Ms. Gentili said. “The doctor jumped back and told me he couldn’t see me and sent me back home with no treatment at all. Imagine if it was something life-threatening?”

A [2015 survey by the National Center for Transgender Equality](#) of over 27,000 trans people found that more than a third of respondents who saw a health provider in the previous year reported having a negative experience, including verbal harassment or refusal of treatment, and more than half of the respondents who sought insurance coverage for transition-related surgeries in the previous year were denied.

In July 2016, the Obama administration [issued a new rule](#) clarifying that Section 1557 of the Affordable Care Act prohibited discrimination on the basis of sex, and that included discrimination based on gender identity (“an individual’s internal sense of gender, which may be different from that individual’s sex assigned at birth”).

The rule made it illegal for health insurance providers to categorize gender transition-related treatments as cosmetic and to explicitly exclude those treatments from their plans. It also set up mechanisms for patients to file discrimination complaints with the H.H.S.’s Office for Civil Rights and established the so-called private right to action, which allowed consumers to file lawsuits in federal courts related to reported violations of Section 1557.

In 2017, Ms. Walker was diagnosed with lung cancer, her second such diagnosis. When she went to the hospital for treatment, she was consistently misgendered, with one nurse saying, “However you look and whoever you say you are out there, in here I am going to call you as I see you,” Ms. Walker writes in her personal statement.

After undergoing an intensive surgery to remove a part of her lung, she said she received inadequate

care at the hospital, with nurses ignoring her requests and, at one point, leaving her to lie amid her own feces for hours — mistreatment that she says in her statement was because of her transgender identity.

“I’m an honorably discharged veteran and to go to the hospital and be mistreated — it’s violence,” Ms. Walker said in the interview. She filed a complaint with the hospital but said she never heard back.

That same year, Ms. Gentili was also denied coverage by her insurer to replace her breast implants because the surgery was deemed cosmetic (the Food and Drug Administration states that implants are not “lifetime devices” and recommends replacing them to avoid health complications).

“My breasts are not cosmetic for me,” Ms. Gentili said. “They are part of my identity. At this point in my life, I just don’t see myself without them.”

In the end, Ms. Gentili said she paid for the surgery out of pocket. Aetna, Ms. Gentili’s insurance provider at the time, confirmed that in 2017 a breast replacement would have been deemed cosmetic. In August this year, the [company changed its policy](#) to cover “breast augmentation for transfeminine members.”

That these experiences of discrimination persisted after the Obamacare protections isn’t necessarily proof that they were ineffectual, said Sharita Gruberg, senior director for the L.G.B.T.Q. research project at the Center for American Progress. “The Civil Rights Act didn’t eliminate race discrimination,” she explained, “it signaled that this is something that our country sees as antithetical to who we are and gave people a mechanism to ensure the government upholds their rights. That’s what Section 1557 was, too.”

In her [own research in 2018](#), Ms. Gruberg analyzed complaints filed to the H.H.S. of discrimination based on sexual orientation, on sex stereotyping related to sexual orientation and those based on gender identity, from 2010 to 2017. “What we found is that the impact of each of these complaints and investigations was so much bigger than the individual case,” Ms. Gruberg said.

“In a lot of cases, the H.H.S. worked with the entity that the complaint was filed against to remedy how care is provided beyond just that complaint, so enacting training for staff, changing policies and really identifying how they can improve care,” she said.

Time to ‘Pause and Reflect’

In August 2016, a month after the Obama administration issued its interpretation of Section 1557, a hospital system, Franciscan Alliance, and five states came together to challenge the rule’s definition of sex, claiming it was too broad and violated the religious freedoms of medical professionals.

That case was filed in the Northern District of Texas, and was one of several similar cases filed around the country. The judge presiding over the case in Texas, Reed O’Connor, in December 2016 issued a nationwide [temporary injunction](#), blocking the portion of the Obamacare rule that prohibited discrimination on the basis of gender identity from taking effect.

Then President Trump was inaugurated. The new administration, instead of appealing Judge O’Connor’s decision, left it standing, signaling that it would come up with its own set of rules soon.

It took the Trump administration more than three years to propose [a clarification](#): Sex “refers to the biological binary of male and female.”

This new rule, known as the 2020 Rule, “eliminates the 2016 Rule’s definitions” of sex, the health department stated. Additionally, the department stated it “no longer intends to take a position on” the private right to action.

That latter part, experts say, is significant.

In practice, it means that while individuals can still file a claim in court saying their rights have been violated, a court may say that the regulations do not permit such suits.

“Those protections are not laid out in the regulations anymore,” leaving it to individual courts to decide, said Lindsey Dawson, associate director of H.I.V. policy at the Kaiser Family Foundation who also focuses on L.G.B.T.Q. health policy issues.

Plus, “litigation is expensive,” Ms. Gruberg said.

“That’s why having these really clear and explicit protections was so important because it allowed people to file a complaint for free and have H.H.S. investigate that complaint,” she added.

The H.H.S. in its 2020 Rule claimed that expanding the definition of sex in 2016 was executive overreach and that it placed unnecessary and expensive “regulatory burdens” on health practices and insurers — some of the same rationales provided for [the administration’s ongoing effort to roll back protections for trans people](#) in the military, schools, prisons and homeless shelters and for those working in federal jobs.

The 2016 Rule also “imposed confusing or contradictory demands on providers, interfered inappropriately with their medical judgment, and potentially burdened their consciences,” the H.H.S. argued.

But in a turn of events that the Trump administration most likely wasn’t expecting, the largely conservative Supreme Court embraced a broader definition of sex than the one the White House was relying on.

“It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,” Justice Neil M. Gorsuch, President Trump’s appointment, wrote for the majority.

A few days after that ruling, Ms. Gentili and Ms. Walker filed their case in the Eastern District of New York — one of a handful across the country — represented by [the Human Rights Campaign and the law firm BakerHostetler](#). They argue that the H.H.S.’s new rule “directly contravenes” the new Supreme Court ruling and, if put in effect, would leave trans people once again vulnerable to discrimination.

“Health care professionals and staff have discriminated against plaintiffs prior to and after the 2016 Rule,” their case filing states. “Plaintiffs fear that the 2020 Rule will only increase the likelihood that they will experience this discrimination again.”

A federal judge has since temporarily blocked the Trump administration’s new health regulations from going into effect.

“When the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision’s impact,” [said Judge Block](#) when issuing the temporary injunction on August 17.

The Trump administration has now requested a standard extension to either respond to the allegations or dismiss the case, and the government’s response would be due on Oct. 2.

But if the government decides to push ahead, its case now seems thin in light of the Supreme Court ruling, said Nicholas Bagley, a law professor at the University of Michigan with a focus on health care law.

“The bottom line is that Section 1557 of the Affordable Care Act now means that you can’t discriminate against transgender people,” he said.