Punitive and Unequal Pregnancies: How Drug Testing Pregnant Women Violates Disparate Impact Provisions Under § 1557 of the Affordable Care Act

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Introduction

Twenty-seven-year-old Shakira Kennedy lived in Brooklyn when she found out she was expecting twins.[1] The morning sickness was unrelenting.[2] It dehydrated her regularly, sent her to the emergency room multiple times, and caused her to lose 30 to 40 pounds.[3] Feeling as though she was out of options, Shakira turned to marijuana to alleviate her symptoms and found that it helped her.[4] At a prenatal visit a little while later, Shakira admitted to using marijuana during her pregnancy in order to combat her debilitating morning sickness.[5] She was subsequently drug tested and the results were placed in a hospital file.[6] After delivering her twins, they were drug tested for marijuana and a variety of other drugs—the results came back negative—and New York's Administration for Children's Services (ACS) filed a neglect petition against her.[7] Her case was eventually dismissed, but only after she underwent substance abuse evaluations, submitted to ongoing drug screens, and attended a parenting class.[8] Shakira's experience has traumatized her and shaken her trust in medical providers and the healthcare system.[9]

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1 Hayley Fox, *Weed and Pregnancy: How Cannabis Laws Are Hurting Mothers*, Rolling Stone (Nov. 17, 2018), https://www.rollingstone.com/culture/culture-features/weed-pregnancy-mother-family-marijuana-cannabis-755697/.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Fox, *supra* note 1.

8 *Id.*

9 *See id.*

Although New York no longer tests pregnant women for marijuana without written consent,[10] it tests for other "illicit" substances, and many other states subject women to a variety of criminal and civil liabilities for drug use during pregnancy.[11] Women of color are disproportionately targeted for drug tests and subjected to criminal or civil consequences for drug use during pregnancy,[12] despite the fact that white women use drugs during pregnancy at slightly higher rates than women of color.[13]

This Comment argues that drug testing women during pregnancy and using those drug tests to subject women to civil or criminal liability violates disparate impact provisions under Section 1557 of the Affordable Care Act,[14] as women of color are disproportionately impacted by these laws. Section 1557 of the Affordable Care Act is its "Nondiscrimination" provision, which states that "an individual shall not . . . [on grounds prohibited under Title VI, Title IX, the Age Discrimination Act, or Section 794 of Title 29] . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . ."[15] Section 1557 applies to any health program or statute receiving federal financial assistance, including physicians and hospitals, and prohibits those entities from discriminating on the basis of race or sex.[16] Currently, there is a circuit split on whether Section 1557 provides a private right of action for disparate impact claims.[17]

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[10] Michael Fitzgerald, *New York City Moves to Limit Drug Testing of Pregnant Women*, THE IMPRINT (Nov. 20, 2020, 4:40 P.M.), https://imprintnews.org/child-welfare-2/new-york-city-limit-drug-testing-women-foster/49557.

[11] MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 31 (2020).

[12] *See* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas Country, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990) ("[A] black woman was 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy.").

[13] *See, e.g.*, Sean Esteban McCabe et al., *Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students*, 6 J. ETHNICITY SUBSTANCE ABUSE, 75, 82 tbl.1 (2008) (showing higher rates of illicit drug use among white undergraduate women than among African-American undergraduate women).

[14] 42 U.S.C. § 18116.

[15] 42 U.S.C. § 18116(a).

[16] Sahar Takshi, *Unexpected Inequality: Disparate-Impact from Artificial Intelligence in Healthcare Decisions*, 34 J.L. & HEALTH 215, 232-33 (2021).

[17] *Compare* Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 240 (6th Cir. 2019), *with* Callum v. CVS Health Corp., 137 F. Supp. 3d 817, 848 (D.S.C. 2015).

This Comment will argue that Section 1557 does in fact create a private cause of action for race-based disparate impact claims.

This Comment will examine the history of criminalizing pregnant women's drug use and current laws that criminalize or impose civil liabilities on women for drug use during their pregnancies. It will then review disparate impact jurisdiction and discuss the possibility of using Section 1557 of the Affordable Care Act to allow for a private cause of action for disparate impact litigation in healthcare. This Comment uses the analytical framework established in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* to argue that Section 1557 creates a disparate impact cause of action that can be applied to drug testing pregnant women. Under this disparate impact analysis, this practice is likely unconstitional, and this Comment suggests less discriminatory alternatives to drug testing pregnant women.

BACKGROUND

I. A BRIEF (AND RACIALIZED) HISTORY OF CRIMINALIZING PREGNANT WOMEN'S DRUG USE

This section will examine the history of criminalizing pregnant women's drug use and the racialized history of relevant laws and regulations. It will discuss *Ferguson v. City of Charleston*, the first major Supreme Court case that considered the legality of drug testing pregnant women for criminal liability. It then reviews current laws that criminalize or impose civil liabilities on women for drug use during their pregnancies and explores hospitals' processes for testing and reporting drug use.

By the mid-1980s, crack cocaine use had risen dramatically in the United States, and politicians and the media warned that this "epidemic" could ravage the nation.[18] The war on drugs, which started under President Nixon in the 1960s with the creation of the Drug Enforcement Administration (DEA), only intensified under President Reagan.[19] In 1986, Congress passed the Anti-Drug Abuse Act, which established mandatory minimum sentences based on the amount of an illicit drug

[18] *See* Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES (Jan. 26, 2009), https://www.nytimes.com/2009/01/27/health/27coca.html.

[19] German Lopez, *Was Nixon's War on Drugs a Racially Motivated Crusade? It's a Bit More Complicated*, Vox (Mar. 29, 2016, 2:00 P.M.), https://www.vox.com/2016/3/29/11325750/nixon-war-on-drugs.

that a defendant possessed or sold.[20] Crack cocaine use was seen as an "urban, inner-city" problem—or more succinctly, a Black problem.[21]

In this climate, the media began warning of so-called "crack babies" born to crack-addicted mothers.[22] Articles warned that these babies would be stunted in their growth and development because of their mothers' drug use, and would eventually become a public welfare burden on society.[23] Given a disproportionate number of black people were using crack cocaine at the time, black women largely became the targets of prosecution for using drugs while pregnant.[24]

In 1989, a Florida woman named Jennifer Johnson became the "first woman in the United States to be criminally convicted for exposing her baby to drugs while pregnant."[25] Johnson was charged with distributing controlled substances to a minor after her children tested positive for cocaine after birth.[26] Following Johnson's conviction, states developed several civil and criminal responses to women's drug use during pregnancy. Hospitals began drug testing women and reporting them to child welfare authorities if they tested positive for illegal drugs, and prosecutors became more zealous for prosecuting pregnant drug users for unrelated crimes such as forging checks.[27] The focus of these prosecutions largely centered on cocaine, which was seen as the most dangerous drug at the time—ignoring the equally deleterious effects of using drugs like alcohol and tobacco during pregnancy.[28]

These zealous prosecutions continued unabated until the Supreme Court heard a drug-testing related case in *Ferguson v. City of Charleston*.[29] In *Ferguson*, plaintiffs sued the Medical University of South

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[20] Nina Totenberg, *Race, Drugs and Sentencing at the Supreme Court*, NPR (June 14, 2021, 3:36 P.M.), https://www.npr.org/2021/06/14/1006264385/race-drugs-and-sentencing-at-the-supreme-court.

[21] *See* Okie, *supra* note 18.

[22] *Id.*

[23] Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 816 (2020).

[24] *Id.* at 817. Punitive drug policies at the time largely focused on cocaine use rather than other substances; broader policies would have pulled in a greater number of women of other races and socioeconomic status. *Id.* at 817 n.300.

[25] Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420 (1991).

[26] *Id.*

[27] *Id.* at 1430-31.

[28] *See* Okie, *supra* note 18.

[29] Ferguson v. City of Charleston, 532 U.S. 67, 70 (2001); *see also* Ferguson v. City of Charleston: *Social and Legal Contexts*, ACLU, https://www.aclu.org/other/

Carolina (MUSC), a public hospital, for reporting pregnant women's drug use to law enforcement.[30] Concerned about the use of cocaine by pregnant women in its care, the hospital began drug testing pregnant women suspected of using cocaine.[31] Initially, the hospital required pregnant women who tested positive for cocaine to undergo substance abuse treatment and counseling.[32] Finding that drug use didn't seem to abate among its patient population, the hospital then partnered with law enforcement to impose criminal liabilities on these women for their drug use during pregnancy.[33] The hospital's protocols imposed liabilities on women for drug use during pregnancy and labor.[34] If a woman was found using drugs two times during her pregnancy or after labor or missed an appointment with a drug abuse counselor, then the hospital would notify law enforcement and the woman (if at least 28 weeks pregnant) would be arrested for possession or distribution to a person under the age of 18.[35] If a woman was 27 weeks or less pregnant, she would "only" be charged with simple possession.[36] Altogether, 30 women were arrested under this policy, and 29 of them were black.[37]

The plaintiffs originally sued under both a Fourth Amendment and disparate impact theory of liability.[38] The Fourth Circuit rejected the disparate impact theory of the case, however, and the plaintiffs did not appeal that portion of the case.[39] Therefore, the Supreme Court considered only the Fourth Amendment question.[40] As a state hospital, MUSC was subject to the "strictures" of the Fourth Amendment.[41] The Court held that MUSC *did* violate the plaintiffs' Fourth Amendment rights against unreasonable search and seizure by subjecting them to

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ferguson-v-city-charleston-social-and-legal-contexts (last visited Feb. 28, 2023) (describing the prevalence of drug testing and prosecuting pregnant women prior to *Ferguson*).

30 *Ferguson*, 532 U.S. at 72-73.

31 *Id.* at 70.

32 *Id.*

33 *Id.* at 71.

34 *Id.*

35 *Id.* at 72.

36 Ferguson v. City of Charleston, 532 U.S. 67, 72 (2001).

37 Ferguson v. City of Charleston: *Social and Legal Contexts*, *supra* note 29.

38 Ferguson v. City of Charleston, 186 F.3d 469, 473 (4th Cir. 1999).

39 *Id.* at 482.

40 *Ferguson*, 532 U.S. at 70.

41 *Id.* at 76.

drug tests without consent and reporting the results of those drug tests to law enforcement.[42]

Since *Ferguson*, states continue to impose criminal liabilities on women for their drug use during pregnancy,[43] and most states also impose civil liabilities onto women for positive drug tests during pregnancy.[44] The Federal Child Abuse Prevention and Treatment Act (CAPTA) conditions federal funds on states imposing laws that require healthcare providers to notify child protective services when the healthcare provider encounters an infant affected by drug use.[45] CAPTA requires states to put in place "policies and procedures . . . to address the needs of infants born with and identified as being affected by substance abuse . . . including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants."[46] Essentially, if an infant is born with symptoms indicating substance abuse like fetal alcohol syndrome[47] or Neonatal Abstinence Syndrome,[48] healthcare providers must address the needs of those infants and notify Child Protective Services of their condition. Hospitals and healthcare providers continue to selectively target, and drug test, pregnant women suspected of using drugs during their pregnancies ostensibly to meet the requirements of CAPTA and local regulations.[49]

Healthcare providers' criteria for drug testing pregnant patients vary. Often, it is based on providers' suspicions and involves other

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[42] *Id.* at 86.

[43] *See* Emma Coleman, *Many States Prosecute Pregnant Women for Drug Use. New Research Says That's a Bad Idea*, VAND. UNIV. MED. CTR. (Dec. 5, 2019), https://www.vumc.org/childhealthpolicy/news-events/many-states-prosecute-pregnant-women-drug-use-new-research-says-thats-bad-idea.

[44] *See* Leticia Miranda et al., *How States Handle Drug Use During Pregnancy*, PROPUBLICA (Sept. 30, 2015), https://projects.propublica.org/graphics/maternity-drug-policies-by-state.

[45] *USA: Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, AMNESTY INT'L (May 23, 2017), https://www.amnesty.org/en/documents/amr51/6203/2017/en/.

[46] 42 U.S.C § 5106(b)(2)(B)(ii).

[47] *Fetal Alcohol Syndrome*, MAYO CLINIC (Jan. 10, 2018), https://www.mayoclinic.org/diseases-conditions/fetal-alcohol-syndrome/symptoms-causes/syc-20352901. Symptoms include low body weight and certain distinctive physical features. *Id.*

[48] *Neonatal Abstinence Syndrome (NAS)*, MARCH OF DIMES (June 2019), https://www.marchofdimes.org/complications/neonatal-abstinence-syndrome-(nas).aspx. Symptoms include tremors, low birth weight, and breathing problems. *Id.*

[49] *See* Lynn M. Paltrow & Jean Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLIT. POL'Y L. 299, 311 (2013).

criteria that disproportionately affect low-income women of color.[50] For example, many hospitals have a policy of automatically drug-testing women who have not sought prenatal care earlier in their pregnancy, including individuals who only sought prenatal care in the second or third trimester.[51] This criterion disproportionately affects women of color who may lack access to health insurance or the ability to see doctors earlier in their pregnancy.[52]

Healthcare providers also often choose to drug test based on the provider's suspicion of drug use. These "suspicions" disproportionately land on women of color. In a study of forced state interventions on pregnant women in the US, the study's authors found that 71 percent of the women affected qualified for an indigent defense (an indication of poverty), and 59 percent were women of color.[53] This over-representation of women of color does not correlate with studies and data indicating that white women and women of color use drugs at roughly the same rates—the caveat being that white women tend to use more prescription drugs during pregnancy.[54] Hospitals that serve a larger population of minority communities generally drug test pregnant women more than hospitals that serve wealthier white women.[55]

Scholars have argued that drug testing pregnant women is unconstitutional or illegal from different legal perspectives, including by violating the Equal Protection Clause[56] or women's civil rights.[57] Yet, despite these legal issues, many states have continued to impose ever-harsher penalties on pregnant women's drug use. For example, Alabama's Supreme Court has interpreted its Chemical Endangerment Law, which addresses exposing children to illicit drugs or substances, to

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[50] *See, e.g.*, HENNEPIN HEALTHCARE SERVS, HENNEPIN HEALTHCARE SERVICES BIRTH CENTER PROCEDURE (2017) (on file with author) (including lack of prenatal care and inadequate prental care in its criteria for drug testing); City of Ferguson v. Charleston, 532 U.S. 67, 71 n.4 (2001).

[51] *Id.*

[52] *Id.*

[53] Paltrow & Flavin, *supra* note 49, at 311.

[54] *See* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781, 794 (2014).

[55] *See* Chasnoff et al., *supra* note 12, at 1204 (finding that only 1.1 percent of pregnant white women testing positive for illicit drug ingestion are reported, compared to 10.7 percent of black women).

[56] Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U REV. L. SOC. CHANGE 381, 382 (2008).

[57] Laura Beth Cohen, *Informing Consent: Medical Malpractice and the Criminalization of Pregnancy*, 116 MICH. L. REV. 1297, 1297 (2018).

include fetuses as "children."[58] Placing these harsh penalties on pregnant women for any drug use during pregnancy only serves to harm women, their children, and their trust in the medical system.

II. DISPARATE IMPACT: AN INTRODUCTION

This section will review disparate impact jurisprudence and the evolution of disparate impact litigation. Disparate impact is a legal theory that allows legal action for unintentional discrimination that evolved through employment law litigation but has expanded to other areas of law. It will then examine some Title VI-related disparate impact cases and outline the impact that *Alexander v. Sandoval* has had on bringing disparate impact claims under Title VI.

Perhaps surprisingly, disparate impact is a legal theory that first emerged out of employment law. In *Griggs v. Duke Power Co.*, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to guarantee a right to be free of discrimination through disparate impact.[59] In *Griggs*, the Court considered the question of whether a company policy that was facially neutral—requiring employees to pass a general intelligence test and obtain a high school diploma to work in most of its departments—was illegal under Title VII if it had a disproportionate impact on racial minorities.[60] The *Griggs* Court held that yes, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[61]

Through *Griggs*, the Court set out initial requirements to determine whether a court should find for a plaintiff under a disparate impact theory of liability.[62] First, the plaintiff must show a specific practice that has a statistical disparity on a protected class of individuals.[63] In *Griggs*, the plaintiffs demonstrated that the company's policy of requiring high school diplomas or passing an intelligence test excluded most African

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[58] *Alabama Supreme Court Rules That Women Can Be Charged with Chemical Endangerment if They Become Pregnant and Use a Controlled Substance*, DRUG POL'Y ALL. (Apr. 21, 2014), https://drugpolicy.org/news/2014/04/alabama-supreme-court-rules-women-can-be-charged-chemical-endangerment-if-they-become-p.

[59] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1970).

[60] *Id.* at 425-26.

[61] *Id.* at 431.

[62] *Id.* at 436.

[63] *Id.* at 432.

Americans from eligibility for other positions in the company.[64] The defendant may defend the practice if it is reasonably related to the functions of the job.[65] The Court in *Griggs* found that neither requirement "was directed or intended to measure the ability to learn to perform a particular job or category of jobs."[66] Since the defendant in *Griggs* could not demonstrate that its requirements of passing an intelligence test or holding a high school diploma were "reasonably related" to the functions of the job, the Court found for the plaintiffs.[67]

Since *Griggs*, the Supreme Court has found that a disparate impact cause of action extends to housing[68] and age discrimination claims.[69] The Court has also added other requirements to making a successful disparate impact claim. In *Washington v. Davis*, the Court held that showing a racially disproportionate impact on a facially neutral law was not enough to make a successful disparate impact claim.[70] In *Davis*, the Court established a burden-shifting framework: after the plaintiff makes out a prima facie case of discriminatory impact, the burden then shifts to the defendant to show that the practice is related to some legitimate non-discriminatory effort.[71] In *Dothard v. Rawlinson*, the Court added one more element to the burden-shifting framework.[72] If the defendant "proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest.'"[73]

Title VI of the Civil Rights Act of 1964 opened the door to disparate impact claims because it prohibits discrimination in programs that receive federal assistance.[74] Section 601 applies to intentional discrimination (disparate treatment) while Section 602 applies to unintentional discrimination (disparate impact).[75] Section 601 holds that "[n]o person

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[64] *Id.* at 428.

[65] Griggs v. Duke Power Co., 401 U.S. 424, 436 (1970).

[66] *Id.* at 428.

[67] *Id.*

[68] *See* Tex. Dep't of Hous. & Cmty. Affrs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

[69] *See* Smith v. City of Jackson, 544 U.S. 228 (2005).

[70] Washington v. Davis, 426 U.S. 229, 241 (1976) (clarifying that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race").

[71] *See id.*

[72] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[73] *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

[74] 42 U.S.C. § 18116.

[75] *See* 42 U.S.C. §§ 2000d–2000d-1.

in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[76] Section 602 states that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d . . . with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."[77]

Over the years the Supreme Court has cut its teeth on several Title VI-related disparate impact claims and ended up with a hodgepodge of jurisprudence. In *Lau v. Nichols*, the Court heard a Title VI disparate impact claim from students of Chinese ancestry in California. [78] The students claimed they had unequal educational opportunities because they could not receive any courses in English.[79] The school had 2,856 students of Chinese ancestry at the time who could not speak English, and only 1,000 were given supplemental instruction in the English language.[80] The Supreme Court held in *Lau* that "[d]iscrimination is barred which has that effect even though no purposeful design is present" and that the school district violated Title VI.[81] Following *Lau*, however, the Court seemed to reverse itself in a split decision under *Regents of University of California v. Bakke*.[82] The Court held in *Bakke* that, based on "clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[83]

Although the *Bakke* decision seemed to imply that it would not be possible to make an unintentional discrimination claim, and therefore not possible to make a disparate impact claim, the Court returned

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[76] 42 U.S.C. § 2000d.

[77] 42 U.S.C. § 2000d-1.

[78] Lau v. Nichols, 414 U.S. 563, 564 (1974).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 568-69.

[82] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[83] *Id.* at 287.

to examine disparate impact in *Guardians Association v. Civil Service Commission*.[84] In *Guardians*, the Court stated that "Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because they were not inconsistent with the purposes of Title VI."[85] The Court thus allowed plaintiffs to bring a claim under a disparate impact discrimination challenge upon re-reading the statutory text of Title VI and considering assistance provided to agencies by the Department of Justice who incorporated disparate impact provisions into their enforcement provisions.[86] In *Alexander v. Choate*, the Court reinforced *Guardians*' holding by stating that *Guardians* created a two-pronged framework from which to analyze Title VI cases.[87] The first prong held that Title VI only reached cases of intentional discrimination, and the second prong held that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."[88] Since neither *Guardians* nor *Choate* fully clarified the steps to take to analyze disparate impact claims under Title VI, many courts followed Title VII's disparate impact analysis[89] when looking at a Title VI claim.[90]

The future of disparate impact claims brought under Title VI was thrown into question, however, when the Supreme Court heard *Alexander v. Sandoval* in 2001.[91] In *Sandoval*, the plaintiff sued the Alabama Department of Safety for administering driver's license exams only in English, arguing that it had the effect of subjecting non-English speakers to discrimination based on national origin.[92] The Court didn't even get to the merits of the case, instead holding that there is no private

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[84] Guardians Ass'n v. Civ. Serv. Comm'n of City of N.Y., 463 U.S. 582 (1982).

[85] *Id.* at 591.

[86] *Id.* at 592.

[87] Alexander v. Choate, 469 U.S. 287, 293 (1985).

[88] *Id.* This holding essentially delegated to agencies the task of deciding what types of disparate impact constituted a significant social problem, and whether the problem was remedial enough to change a policy.

[89] *See supra* Background, Part II.

[90] *See* NAACP v. Med. Ctr., Inc., 657 F.2d 1322, 1333 (3d Cir. 1981) (en banc) (accepting without comment parties' suggestion that "the decisional law allocating the burden of production and persuasion under Title VII is instructive in [a Title VI] case"); *see also* Bd. of Tr. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25-26 (1978) (per curiam); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 572-78 (1978); McNeil v. McDonough, 648 F.2d 178, 182 (3d Cir. 1981) (per curiam); Smithers v. Bailar, 629 F.2d 892, 898-99 (3d Cir. 1980); Kunda v. Muhlenberg Coll., 621 F.2d 532, 556 n.3 (3d Cir. 1980).

[91] Alexander v. Sandoval, 532 U.S. 275 (2001).

[92] *Id.* at 279.

cause of action for the plaintiff under Section 602 of Title VI.[93] Rather than individual plaintiffs suing to get their cases heard, agencies would have to decide to take forward a disparate impact cause of action under Title VI.[94] The Supreme Court did leave an opening for Congress to intervene, holding that Congress could create a private right to action legislatively through specific laws.[95] Justice Antonin Scalia wrote: "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."[96] Section 1557 of the Affordable Care Act provides just that legislative opening.

III. SECTION 1557 OF THE AFFORDABLE CARE ACT: NONDISCRIMINATION PROVISION

This section highlights the possibility of using Section 1557 of the Affordable Care Act to allow for a private cause of action for disparate impact litigation in healthcare. Although there is currently a circuit split on the issue, the text and legislative history of Section 1557 make clear that it is intended to create a private cause of action for disparate impact litigation in healthcare.

Although the future Title VI-related disparate impact cases seemed bleak after the *Sandoval* decision, individual statutes have started filling the gaps. Post-*Sandoval*, it seemed that the Department of Health and Human Services' (HHS) Office of Civil Rights would be the only entity capable of hearing a disparate impact claim in healthcare and deciding whether to bring it to the courts.[97]

In 2011, however, when Congress crafted the Affordable Care Act, it drafted a provision called Section 1557, the "Nondiscrimination" provision.[98] Section 1557 states that any health program or activity receiving federal assistance may not discriminate against individuals for

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[93] *Id.* at 293.

[94] *See id.* at 289.

[95] *Id.* at 286.

[96] *Id.* at 291.

[97] *See* Sarah G. Steege, Note, *Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 MICH. J. RACE & L. 439, 443 (2011).

[98] 42 U.S.C. § 18116.

any grounds prohibited under Title VI,[99] Title IX,[100] the Age Discrimination Act,[101] or Section 794 of Title 29.[102] It also allows for HHS to draft further rules in accordance with the Act.[103]

A. *Agency Interpretation of Section 1557*

In 2016, under the Obama Administration, HHS issued a "final rule" under Section 1557.[104] The final rule stated that the Office of Civil Rights "interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation."[105] Under this rule, HHS interpreted Section 1557 to "allow beneficiaries to bring claims under *any* remedy prescribed by discrimination against the protected classes named by the statute, including . . . disparate impact claims for race, color, and national origin discrimination."[106] The 2016 HHS final rule made clear that individuals had the right to bring private suits asserting disparate impact claims for all of the protected classes identified in Section 1557.[107]

In 2020, under the Trump Administration, HHS issued a new final rule under Section 1557, reversing several changes made under the 2016 rule.[108] Although the 2020 HHS Rule stated that Section 1557 did not create a cause of action for disparate impact in sex discrimination, the rule did state that "[t]he Department will vigorously enforce the prohibitions on discrimination based on race or sex, including under disparate impact analysis with respect to race

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[99] 42 U.S.C. § 2000d. Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin.

[100] 20 U.S.C. § 1681. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex.

[101] 42 U.S.C. § 6101. The Age Discrimination Act of 1975 prohibits discrimination on the basis of age.

[102] 29 U.S.C. § 794. Section 794 prohibits discrimination on the basis of disability.

[103] *See* 42 U.S.C. § 18117.

[104] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

[105] *Id.* at 31440.

[106] Allison M. Tinsey, *Regulating Relief: Private Right of Action Jurisprudence in Healthcare Discrimination Cases*, 20 RICH. PUB. INT. L. REV. 305, 311 (2017).

[107] *See* 42 U.S.C. § 18116.

[108] Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) (codified at 45 C.F.R. pts. 86, 92, 147, 155, 156).

discrimination as provided for in the relevant Title VI regulations."[109] The 2020 HHS final rule limited Section 1557's breadth, but it also left open the possibility that plaintiffs could bring forward a race-related disparate impact claim under Section 1557. In August 2022, the HHS under the Biden administration reversed this stance by issuing a Notice of Proposed Rulemaking to Section 1557 that would affirm its protections against discrimination on the basis of race, color, national origin, sex, age, and disability.[110] Moreover, the Congressional history of the Act and the language of Section 1557 make clear lawmakers' intent to create a private right of action for disparate impact litigation in healthcare.

B. *Legislative History and Intent*

Although the legislative history of the Affordable Care Act does not specifically mention Section 1557, throughout the process lawmakers have discussed the impact they hoped the Affordable Care Act would have in combatting healthcare discrimination.[111] Additionally, as discussed above, under the Obama Administration, HHS first interpreted Section 1557 as creating a private right of action in disparate impact litigation.[112] This indicates that one of the legislation's primary creators, President Obama, intended for the legislation to create a private right of action.

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[109] *Id.* at 37175.

[110] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (proposed Aug. 4, 2022).

[111] *See* Steege, *supra* note 97, at 443 n.121 (2011); *see, e.g.*, 156 CONG. REC. S11908 (2009) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) ("Our dear friend, Senator Ted Kennedy, said it so well in the letter about the health reform imperative that President Obama read to a joint meeting of Congress . . . . 'What we face is above all a moral issue; that at stake are not just the details of policy, but fundamental principles of social justice and the character of our country.' This is such a time. It is my hope and belief the Senate I love will once again rise to the occasion.'); 156 CONG. REC. S11988 (2009) (statement of Sen. Max Baucus, Chairman, S. Comm. on Finance) ("[W]omen are discriminated against today in America in various ways . . . It is another reason this health care reform is going to mean so much for so many Americans."); 156 CONG. REC. H1855 (2010) (statement of Rep. Steny Hoyer, House Majority Leader) ("It is more control . . . [f]or consumers, and less for insurance companies. It is the end of discrimination against Americans with preexisting conditions, and the end of medical bankruptcy and caps on benefits.").")

[112] *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

C. *Circuit Splits on Section 1557's Protections*

Thus far, the courts appear to be split on whether Section 1557 uniformly creates a private right of action to bring forward a disparate impact claim under the protected categories listed.[113] In *Callum v. CVS Health Corporation*, a black customer who suffered from Post-Traumatic Stress Disorder (PTSD) sued CVS claiming that it failed to accommodate his disability and discriminated against him because of his race.[114] The court held that "Congress intended to create a private right and private remedy for violations of Section 1557 by expressly incorporating the enforcement provisions of the four federal civil rights statutes."[115] To reach that holding, the court compared the similar statutory language under the four statutes cited in Section 1557, finding parallel language in the statutes that seemed to indicate parallel causes of action.[116]

In *Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc.*, however, the court declined to find a private right of action for race-based claims.[117] The court held that Congress's decision to incorporate four different statutes into Section 1557 indicated an intention to "import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue."[118] Under the court's construction of rights, plaintiffs have no private right of action under race-related disparate impact claims due to *Sandoval*.[119]

Courts' views on Section 1557 continue to churn, with no clarity from the Supreme Court for the foreseeable future. The Court had planned to hear oral arguments on a related case, *Doe v. CVS Pharmacy*,

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113 *See* Callum v. CVS Health Corp., 137 F. Supp. 3d 817 (D.S.C. 2015). The court held there is a private right of action under Section 1557 because it incorporates the enforcement provisions of other federal statutes that provide private rights of action, demonstrating Congressional intent to create a private remedy for violations under 155. *Id.* at 848. *But see* Doe v. BlueCross BlueShield of Tenn. Inc., 926 F.3d 235 (6th Cir. 2019) (holding that the appropriate standard of discrimination for a claim under the Affordable Care Act is one that is applicable under one of the appropriate statutes depending on the type of discrimination the plaintiff is fighting against—for example, an age discrimination claim, following the statutory provisions allowed for under the Age Discrimination Act).

114 *See Callum*, 137 F. Supp. 3d at 828.

115 *Id.* at 848.

116 *Id.* at 847-48.

117 Se. Pa. Transp. Auth. v. Gilead Scis., Inc., 102 F. Supp. 3d 688, 701-02 (E.D. Pa. 2015).

118 *Id.* at 698-99.

119 *See id.* at 701.

in December 2021.[120] The question in *Doe* was whether Section 504 of the Rehabilitation Act of 1973—and by extension Section 1557, which incorporates the 'enforcement mechanisms' of Section 504 and the other civil rights statutes—provides a disparate impact cause of action for plaintiffs alleging disability discrimination.[121] This case could have created reverberations for the future of disparate impact litigation under Section 1557 writ large. In November 2021, however, CVS Pharmacy settled the case with plaintiffs and the parties dropped the litigation.[122] For the foreseeable future, the circuit splits on disparate impact will remain. The next section will delve more deeply into how courts may find a cause of action for disparate impact through a statute and apply this analysis to Section 1557.

ANALYSIS

I. APPLICATION

This section examines the Supreme Court's disparate impact analytical framework in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* It will then apply this framework to show that Section 1557 creates a disparate impact cause of action. Finally, it will apply disparate impact analysis to the drug testing of pregnant women, show how this policy disproportionately impacts women of color, and suggest less discriminatory alternatives to this practice.

A. Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. *as a Framework for Interpreting Disparate Impact Statutory Provisions*

The 2015 Supreme Court case, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, provides a useful frame from which to examine how the Court has determined whether a particular piece of legislation creates a disparate impact cause of action. In *ICP*, the Court considered whether the Fair Housing Act created a

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120 Doe v. CVS Pharmacy, Inc., 982 F.3d 1204 (9th Cir. 2020), *cert. granted in part*, 141 S. Ct. 2882 (2021), *and cert. dismissed*, 142 S. Ct. 480 (2021).

121 *See CVS Pharmacy*, 982 F.3d at 1209.

122 *See* Alison Frankel, *CVS's Abrupt Dismissal of SCOTUS Case Was Surprise to Opposing Counsel*, REUTERS (Nov. 12, 2021, 6:14 P.M.), https://www.reuters.com/legal/government/cvss-abrupt-dismissal-scotus-case-was-surprise-opposing-counsel-2021-11-12/.

disparate impact cause of action for race discrimination.[123] To engage in its analysis, the Court turned to 703(a) of Title VII of the Civil Rights Act of 1964,[124] addressed in *Griggs v. Duke Power Co.*,[125] and the Age Discrimination in Employment Act,[126] addressed in *Smith v. City of Jackson*,[127] to determine how those cases found an intent to create a disparate impact cause of action in the respective statutes.[128]

Griggs, discussed earlier in this Comment, focused on whether an employer's policy of requiring manual laborers to have a high school diploma and pass two intelligence tests violated Title VII for its disparate impact on Black applicants.[129] To determine whether the plaintiffs had a valid cause of action, the *Griggs* Court turned to the language of Section 703(a) itself:

> It shall be an unlawful employer practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[130]

Looking at the language of 703(a)(2), the *ICP* Court "reasoned that disparate-impact liability furthered the purpose and design of the statute."[131] Through Section 703(a)(2), the Court found that Congress "proscribe[d] not only overt discrimination but also practices that are

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123 Tex Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524-25 (2015).

124 42 U.S.C. § 2000e-2(a).

125 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970).

126 29 U.S.C. § 623.

127 Smith v. City of Jackson, 544 U.S. 228, 233-35 (2005).

128 *Inclusive Cmtys. Project*, 576 U.S. at 530, 532-33.

129 *Griggs*, 401 U.S. at 429-30.

130 *Id.* at 436 n.1 (quoting 42 U.S.C. § 2000e-2(a)).

131 *Inclusive Cmtys. Project*, 576 U.S. at 531.

fair in form, but discriminatory in operation."[132] The Court tied this back to Title VII's goal of achieving equal employment opportunities and breaking down barriers to entry, and held that Section 703 of "Title VII must be interpreted to allow for disparate impact claims."[133]

The *ICP* Court then turned to *Smith v. City of Jackson* to determine how the *Smith* Court found a disparate impact cause of action in the Age Discrimination in Employment Act (ADEA). Section 4(a) of the ADEA states:

> It shall be unlawful for an employer—
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> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
> (3) to reduce the wage rate of any employee in order to comply with this chapter.[134]

In *Smith*, the Supreme Court first addressed the question of whether this section of the ADEA created a cause of action for a disparate impact claim for age discrimination.[135] The plurality in *Smith* also addressed the *Griggs* decision and Title VII for reference.[136] The *Smith* Court noted that both Section 703(a)(2) of Title VII and Section 4(a)(2) of the ADEA had language "prohibit[ing] such actions that deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race or age."[137] The *Smith* Court noted that the relevant text of both Title VII and the ADEA "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," thus creating the

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[132] *Id.*

[133] *Id.* (quoting *Griggs*, 401 U.S. at 429-30).

[134] 29 U.S.C. § 623(a).

[135] Smith v. City of Jackson, 544 U.S. 228, 233-34 (2005).

[136] *Id.* at 235-36.

[137] *Id.* at 235 (cleaned up).

necessary statutory intent to recognize a cause of action for disparate impact liability under these statutes.[138]

Taking in the lessons from *Griggs* and *Smith*, the *ICP* Court found that anti-discrimination laws can be found to have disparate impact provisions "when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[139] The Court noted that disparate impact liability must also be limited to not restrict entities' abilities to make practical business choices.[140] Finally, before a Court rejects a defendant's "business necessity" defense, the plaintiff must show that there is some other less discriminatory alternative the entity could follow that doesn't create a disparate impact and still meets the entity's legitimate needs.[141]

With this framework in mind, the *ICP* Court turned to the text of the FHA to determine whether it created provisions for disparate impact liability. Two sections provided the relevant language to consider. Section 804(a) states it is unlawful:

> "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[142]

Section 805(a) states:

> "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."[143]

Comparing the language in the FHA to the ADEA and Title VII, the *ICP* Court found that the FHA does in fact encompass disparate impact claims.[144] Similar to the other two statutes, the FHA has language that refers to the consequences of an actor's actions rather than

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138 *See id.* at 236.

139 Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 533 (2015).

140 *Id.*

141 *Id.*

142 *Id.* (quoting 42 U.S.C. § 3604(a)).

143 *Inclusive Cmtys. Project*, 576 U.S. at 534 (quoting 42 U.S.C. § 3605(a)).

144 *See Inclusive Cmtys. Project*, 576 U.S. at 534.

an actor's intent where it uses the phrase "otherwise make unavailable."[145] Additionally, the Court noted that these consequence-related phrases in all three statutes were located in similar places: "At the end of lengthy sentences that begin with prohibitions on disparate treatment."[146] Although Congress did not repeat the exact same language of Title VII in the FHA, the *ICP* Court found that Congress chose words with the same "purpose . . . and meaning" for the FHA.[147]

Although the *ICP* Court primarily turned to statutory interpretation to determine that the FHA created a disparate impact cause of action, the Court did make a few additional observations that bolstered its conclusion. It noted that Congress amended the FHA in 1988 after all nine federal courts of appeals had held that the FHA encompasses disparate impact claims.[148] Additionally, the *ICP* Court found that recognizing disparate impact claims "is consistent with the FHA's central purpose," as it "was enacted to eradicate discriminatory practices within a sector of our Nation's economy."[149]

The Supreme Court's analysis in *ICP* shows how courts may determine whether a particular statute contains a disparate impact provision. By looking for consequence-driven language in a statute, prohibitions in the statute on discrimination, legislative history, agency interpretation, and the overall goal of the statute itself, courts can determine whether a particular statute intends to create a disparate impact cause of action.

B. *Applying Analysis to Section 1557*

Turning to the question of whether Section 1557 of the Affordable Care Act creates a disparate impact cause of action, the Supreme Court's analysis in *ICP* creates a roadmap to answering this question.

First, looking at the statute itself, Section 1557 of the Affordable Care Act's "Nondiscrimination" provision states that:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX

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145 *Id.*

146 *See id.* at 534-35.

147 *Id.* at 535.

148 *Id.*

149 *Id.* at 539.

> of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.[150]

Looking at the text of Section 1557 itself, Section 1557 has similar "consequence-driven" language as Title VII, ADEA, and the FHA. Section 1557's text states that individuals shall not "be excluded from participation in . . . or be subjected to discrimination under" a health program or activity that receives federal funds.[151] This statutory language is similar to the language in Title VII and the ADEA, which state that policies are unlawful where they "deprive or tend to deprive"[152] individuals of a benefit because of a protected category, and the FHA's language of "otherwise make unavailable."[153] As the Court stated in *ICP*, this consequence-driven language is critical in determining whether a particular statute intends to create a disparate impact cause of action because that language refers to the consequences of an actor's actions rather than an actor's intent.[154] Disparate impact analysis applies where a policy or practice is facially neutral but has the *consequence* of creating a discriminatory impact on a particular group based on a protected characteristic.

Section 1557's language *does* differ from Title VII, the FHA, and the ADEA in one significant way, however. Although the latter three statutes prohibit discrimination using the language "because of" a protected category, Section 1557 instead lists a series of other statutes and prohibits discrimination "on the ground prohibited by" Title VI (race,

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150 42 U.S.C. § 18116(a).

151 *Id.*

152 42 U.S.C. § 2000e-2; 29 U.S.C. § 623(a).

153 42 U.S.C. § 3604(a).

154 *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 520 (2015).

color, or national origin), Title IX (sex), the Age Discrimination Act (age) or Section 794 of Title 29 (disability).[155] This creates a unique question of whether to apply Section 1557's protections uniformly under the protected categories of all the listed statutes, or whether it applies differently based on which protected characteristic an individual or group raises a claim. For example, individual disparate impact claims *can* be brought under Title IX's anti-discrimination provision, which addresses sex discrimination,[156] but they are barred under Title VI, which addresses race discrimination.[157]

As discussed above, courts are split on how to treat the issue of protected categories. In *Rumble v. Fairview Health Services*, the District Court of Minnesota held that Section 1557 does apply uniformly to all protected categories.[158] Looking at Section 1557 in the context of the ACA as a whole, the court held that "Congress intended to create a new, health-specific anti-discrimination cause of action that is subject to a *singular* standard, regardless of a plaintiff's protected class status. Reading Section 1557 otherwise would lead to an illogical result, as different enforcement mechanisms and standards would apply to a Section 1557 plaintiff depending on whether the plaintiff's claim is based on her race, sex, age, or disability."[159] Further, the courts would be confused about what standard to apply if a plaintiff made a mixed motive discrimination claim under Section 1557.[160] Although other courts have held that Section 1557's protections should apply differently based on which protected category plaintiffs are seeking protection under,[161] the *Rumble* and *Callum*[162] courts' analysis make more sense. The goal of the Affordable Care Act is to improve healthcare services and coverage

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155 42 U.S.C. § 3604(a).

156 *See* Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (holding Title IX permits disparate impact suits).

157 *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding no private right of action exists to enforce disparate impact regulation under Title VI).

158 Rumble v. Fairview Health Servs., No. 14-CV-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015), at *11.

159 *Id.*

160 *Id.*

161 Se. Penn. Transp. Auth. v. Gilead Scis, Inc., 102 F. Supp. 3d 688, 698-99 (E.D. Pa. 2015); *see* discussion *supra* Background, Part III, Section B. In *SEPTA*, the court decided race and disability disparate impact claims brought under Section 1557 separately and held that the race-related disparate impact claim failed because *Sandoval* did not allow for a private cause of action under Title VI.

162 *See also* discussion *supra* Background, Part III, Section C; *see generally* Callum v. CVS Health Corp., 137 F. Supp. 3d 817 (D.S.C. 2015).

for Americans, and the goal of the "Nondiscrimination" provision in particular is to protect Americans against discrimination in healthcare services. Interpreting Section 1557 to provide uniform protection to plaintiffs regardless of their protected category is consistent with the statute's central purpose.

This interpretation is consistent with the 2016 HHS final rule interpreting Section 1557.[163] The final rule referenced *Rumble*, stating that the *Rumble* court had interpreted Section 1557 correctly to allow beneficiaries to bring claims under any remedy "prescribed by discrimination named by the statute" including disparate impact claims for race discrimination.[164] HHS's 2016 final rule on Section 1557 shows clear agency intent to bring forward a uniform cause of action under Section 1557.

The legislative history of the ACA also makes clear that lawmakers intended to provide stronger protections for patients to prevent discrimination in the healthcare system.[165] The ACA is meant to provide equal protections for patients under the law, and Section 1557 is a key provision to protect against discrimination. It is unlikely that lawmakers would have tried to dilute protections for patients depending on which protected class they sued under.

If Section 1557 is interpreted in a piecemeal fashion and only enables a cause of action where the existing statutes cited already allow for it, then plaintiffs will not be able to claim a disparate impact cause of action for race-based discrimination under Section 1557. In *Sandoval*,[166] the Supreme Court held that there is no private right of action to bring a disparate impact claim under Title VI. Although numerous other articles and scholars believe *Sandoval* was wrongly decided,[167] *Sandoval* is still good law, and it is unlikely that the current Supreme Court will limit or overturn its holding anytime soon. The Supreme Court *was* slated to hear a similar case to determine the scope of Section 1557's protections

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163 *See generally* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

164 *See id.* at 31439-40.

165 *See* Steege, *supra* note 97, at 443.

166 *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

167 *See, e.g.*, Tinsey, *supra* note 106, at 310 ("In effect, Scalia's holding misapplies the deference standard articulated in *Chevron* that allows courts to look at agency interpretations of statutes to determine the intent of Congress."); *see generally* Brianne J. Gorod, *The Sorcerer's Apprentice:* Sandoval, Chevron, *and Agency Power to Define Private Rights of Action*, 113 YALE L.J. 939 (2003).

in *Doe*,[168] but the parties settled the case out of court and dropped the case in November 2021,[169] so the current circuit split on Section 1557's protections remains.[170]

Although the full scope of Section 1557's protections remains up in the air, the statutory language, legislative history, and agency interpretation all indicate that it is meant to extend uniform anti-discrimination protections to all the protected classes referenced in the four civil rights statutes listed. Having established that Section 1557 does create a private right of action for plaintiffs who wish to make race-related disparate impact claims in the healthcare context, we must now apply this analysis to look at a possible disparate impact claim for pregnant women of color.

C. *Section 1557 Disparate Impact Analysis Applied to Discriminating Against Pregnant Women of Color*

Section 1557 of the ACA should and does create a private right of action for race-related disparate impact claims in the healthcare context. Having determined that Section 1557 creates a private right of action to disparate impact claims in healthcare, it must be determined whether Section 1557 applies to the context of healthcare providers drug-testing pregnant women. Under Section 1557, any hospital or healthcare provider that receives federal funds is accountable for any disparate impact in drug testing and subjecting pregnant women of color to civil or criminal liability for positive drug tests in pregnancy.[171]

First, to establish disparate impact, the plaintiff must identify the protected class and offer evidence to show how that class has been discriminated against. Here, the protected class is women of color. Although drug use is fairly consistent across class and race,[172] pregnant

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168 *See generally* Doe v. CVS Pharmacy, Inc., 982 F.3d 1204 (9th Cir. 2020), *cert. granted in part*, 141 S. Ct. 2882 (2021), *and cert. dismissed*, 142 S. Ct. 480 (2021).

169 *See* Frankel, *supra* note 122.

170 *Compare* Rumble v. Fairview Health Servs., No. 14-CV-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); Callum v. CVS Health Corp., 137 F. Supp. 3d 817 (D.S.C. 2015) *with* Se. Penn. Transp. Auth. v. Gilead Scis., Inc., 102 F. Supp. 3d 688 (E.D. Pa. 2015); Griffin v. Gen. Elec. Co., 752 Fed. Appx. 947 (11th Cir. 2019) (per curiam).

171 *See* 42 U.S.C. § 18116(a); *see also* Takshi, *supra* note 16.

172 U.S. Dep't of Health & Hum. Servs., HHS-14-4863: *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings* 26 (2014) ("There were no statistically significant differences in the rates of current illicit drug use between 2012 and 2013 for any of the racial/ethnic groups.").

women of color are disproportionately targeted for drug use during pregnancy. In multiple research studies in different states, researchers have collected urine samples from pregnant women in a particular city or county.[173] In testing pregnant women's urine samples for drug use over a one-month period in Florida, for example, researchers found that 15.4 percent of White women tested positive for drug use, whether marijuana, alcohol, cocaine, or opiates, while 14.1 percent of Black women tested positive for these substances.[174] Despite that White pregnant women actually seemed to use drugs at a slightly higher rate than Black pregnant women, only 1.1 percent of White women were reported, while 10.7 percent of Black women were reported.[175] Therefore, Black women were 9.6 times more likely to be reported than White women for drug use during pregnancy.[176] In a similar study conducted in California, the researchers looked at data from providers in California that had implemented universal testing of pregnant women for drug and alcohol use.[177] They wrote: "Despite Black women having alcohol-drug use identified by prenatal providers at similar rates to White women and entering treatment more than expected, Black newborns were four times more likely than White newborns to be reported to [Child Protective Services] at delivery."[178]

Evidence also suggests that women of color are more likely to face harsher criminal penalties for crimes arising during pregnancy. In a study conducted by authors examining rates of arrests for pregnant women over a 30-year period, the authors found that of 368 arrested pregnant women who could be identified by race, 59 percent of those women were women of color and 52 percent were Black.[179] Although 71 percent of the White women arrested were charged with felonies, 85 percent of the Black women arrested were charged with felonies.[180] The evidence clearly demonstrates that women of color are statistically

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[173] *See* Chasnoff et al., *supra* note 12, at 1202.

[174] *Id.* at 1204.

[175] *Id.*

[176] *Id.*

[177] Sarah C.M. Roberts & Amani Nuru-Jeter, *Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting*, 39 J. BEHAV. HEALTH SERVS. & RES. 3, 6 (2012).

[178] *Id.* at 3.

[179] *See* Paltrow & Flavin, *supra* note 49, at 311.

[180] *Id.* at 322.

more likely to face civil or criminal liabilities for drug use during pregnancy despite that pregnant women use drugs at similar rates across race.

Having identified evidence that this protected class has been discriminated against, the second step in disparate impact analysis is to show a causal link between the disparity identified and the relevant policy or law. This analysis will be somewhat context-dependent based on the class of plaintiffs bringing a case forward, but the ultimate point is that inconsistent hospital policies that allowed providers to test on the bases of "suspected" drug use creates this disparate impact on women of color. Hospital providers' testing and reporting of pregnant women is usually the starting point from which women face civil and criminal liabilities.

Given hospital resources are limited, hospital staff usually decide to drug test women based on established factors or "suspicions" that largely center on women and women of color. In a study to determine whether race is a factor in hospitals' decisions to drug test newborns, researchers examined records of 2,121 mother-infant pairs.[181] Despite the fact that hospitals had detailed criteria on whether to drug test a newborn, 35.1 percent of infants born to Black mothers met the criteria to be tested while only 12.9 percent of infants born to White women were tested.[182]

Hospital criteria for testing itself can be centered on punishing women of color for being "bad mothers." For example, the Hennepin County hospital testing procedure in Minnesota outlines scenarios in which providers should drug test a pregnant woman.[183] One criterion the hospital policy uses to test a pregnant woman is if she has waited until late in her pregnancy to seek prenatal care.[184] This automatically centers suspicion onto women of color, who are more likely to lack access to health insurance to seek care and may have less trust in medical providers.

Once a hospital decides to test a woman for illicit substance use, she has little option but to say no. In the battery of consent forms a woman must sign to be admitted into most hospitals or clinics, she may

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[181] Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS 1379, 1380-81 (2010).

[182] *Id.* at 1832.

[183] HENNEPIN HEALTHCARE SERVS., *supra* note 50.

[184] *Id.*

have already signed away her right to consent to drug testing.[185] Even if a hospital informs a woman that they plan to drug test her, if she refuses, the hospital may notify Child Protective Services and pull her into the civil liability system.[186] Hospitals may still test a newborn baby without a mother's consent by testing the baby's meconium, or first stool after birth, which can provide evidence of whether the mother used drugs while pregnant.[187] Overall, this patchwork of hospital testing policies places overwhelming scrutiny on pregnant women of color, who are subsequently subject to criminal and civil liabilities if they test positive for any illicit substance. These policies create a clear disparate impact on pregnant women of color.

Once a plaintiff has established a prima facie case of disparate impact, the defendant may claim there is a substantial legitimate justification for its policy. Hospitals and healthcare providers may claim both legal and policy justifications for drug testing pregnant women. Hospitals may claim that testing certain "at risk" pregnant women is necessary to promote both maternal and neonatal health and to provide treatment for mothers and infants if necessary.[188] Additionally, hospitals may claim that drug testing pregnant women is a matter of promoting child welfare.[189] Finally, hospitals may claim that CAPTA[190] requires that hospitals have some sort of protocol in place to identify infants affected by illicit substance use.

Although testing pregnant women may seem to promote maternal and neonatal health, it actually does the opposite. Women who are drug tested without consent and subjected to criminal or civil liability may lose their trust in healthcare providers and may stop seeking prenatal care altogether.[191] Refusing to seek prenatal care can be much worse for an infant's health than a mother's drug use during pregnancy. In fact, studies have shown that infants born with Neonatal Abstinence

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185 Wendy Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 346 (2014).

186 KRISTA DRESCHER-BURKE & AMY PRICE, NAT'L ABANDONED INFANTS ASSISTANCE RES. CTR., IDENTIFYING, REPORTING AND RESPONDING TO SUBSTANCE EXPOSED NEWBORNS: AN EXPLORATORY STUDY OF POLICIES AND PRACTICES 20 (2005); Kathryn Wells, *Substance Abuse and Child Maltreatment*, 56 PEDIATRIC CLIN. N. AM. 345, 356 (2009) ("Depending on a hospital's policy, consent may need to be obtained prior to testing the mother or infant.").

187 Bach, *supra* note 185, at 347.

188 Wells, *supra* note 186, at 350.

189 *Id.*

190 *See* 42 U.S.C. § 5101; Bach, *supra* note 185, at 349.

191 *See, e.g.*, Fox, *supra* note 1.

Syndrome, which is caused by a mother's drug use during pregnancy, require only monitoring and recover well after constant physical touch with a mother and breastfeeding.[192] Separating a mother from an infant because of her drug use during pregnancy can be much more damaging to the infant's long-term growth and development than the mother's drug use itself.

If courts were to find that hospitals raised a legitimate nondiscriminatory rationale for drug testing pregnant women, however, plaintiffs have an opportunity to state a less discriminatory alternative to achieving the same goal. Healthcare providers' "legitimate" goal in this case is to promote prenatal health during pregnancy. In that case, hospitals could create a policy to not drug test women during pregnancy at all and only test infants with health conditions indicative of current drug dependence. If the infant tests positive, then hospitals can provide treatment to both the mother and the infant. This would meet CAPTA's requirement and promote maternal and infant health without creating damaging civil and criminal consequences. Alternatively, plaintiffs could also argue, as the plaintiffs in *Ferguson* did, that if healthcare providers drug test pregnant women at all, they should drug test all pregnant women.[193] Healthcare providers would then have to clearly outline their procedures publicly for when and how they would drug test as well as what substances they would test for. This may include quarterly tests or check-ins at the first- or second-trimester. Further, for any women who do test positive, the focus should be on treatment for the mother and fetus, not on punitive civil or criminal liabilities. Testing all pregnant women, and outlining clear procedures for doing so, would take away the disparate impact this testing currently has on women of color.

Although the exact contours of a disparate impact lawsuit challenging drug testing pregnant women would vary based on the particular plaintiffs and facts, this type of lawsuit can be successful if courts hold that Section 1557 creates a private cause of action for race-based discrimination claims. Pregnant women of color deserve to be cared for equally under the law. Enabling a disparate impact claim will enable them to move closer toward equitable treatment in the healthcare system.

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[192] Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 832 (2019).

[193] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 78-79 (2001).

CONCLUSION

Drug testing pregnant women without their consent and subjecting them to criminal or civil liability if they test positive for drugs violates Section 1557 of the Affordable Care Act. Because the Supreme Court weakend the potency of disparate action in Title VI litigation through its decision in *Alexander v. Sandoval*, the Court left open the door for individual agencies to allow private causes of action under disparate impact. HHS took this route when it established Section 1557. Although courts are still split on this issue, Section 1557 was intended to create a uniform private right of action for disparate impact-related cases in healthcare. Women of color who are disproportionately harmed by this policy nationwide deserve a legal recourse through this statute to ensure their pregnancies are treated equitably. It seems that the Biden Administration agrees.