



Transgender Legal Defense & Education Fund

August 13, 2019

BY ELECTRONIC SUBMISSION

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA1
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

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Mr. Roger Severino
Director
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Ave. S.W.
Washington, DC 20201

**Re: Nondiscrimination in Health and Health Education
Programs or Activities (Section 1557 NPRM), RIN
0945-AA11**

Dear Secretary Azar and Mr. Severino:

The Transgender Legal Defense & Education Fund (TLDEF) is a 501(c)(3) nonprofit whose mission is to end discrimination and achieve equality for transgender and non-binary people, particularly those in our most vulnerable communities. We provide legal representation to transgender individuals who have been subject to discrimination, focusing on the key issues of employment, education, public accommodations, and healthcare. We also provide public education on transgender rights.

Transgender Legal Defense & Education Fund, Inc.

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TLDEF appreciates the opportunity to comment on the Notice of Proposed Rulemaking Regarding Nondiscrimination in Health Programs and Activities under Section 1557 of the Patient Protection and Affordable Care Act (ACA). Section 1557 contributes to the health equity of the transgender community, promotes equal access to healthcare for all, and increases affordability and accessibility of coverage and care for all individuals.

TLDEF opposes the proposed rule and the rolling back of explicit and necessary protections for transgender individuals.¹ The proposed rule will be detrimental to transgender people by threatening to mislead individuals and institutions into thinking that discrimination against transgender individuals seeking to access medically necessary health care is permissible even though it is still prohibited by statute. It is also inconsistent with existing jurisprudence, other anti-discrimination legislation and general healthcare and insurance trends. This will cause unnecessary confusion and have a chilling effect on transgender people seeking to access healthcare.

TLDEF also opposes the proposed changes to roll back other, long-standing rules that prohibit discrimination on the basis of gender identity and sexual orientation.² These changes are outside of the Office for Civil Rights' (OCR) jurisdiction and are unrelated to Section 1557 of the ACA. It is not appropriate for these rulemakings to be combined, and it is arbitrary and capricious for HHS to characterize them as "conforming amendments" without offering any legal, policy or cost-benefit analysis about them and their impacts on various CMS programs. In particular, HHS offers no analysis of the impact these regulations have had during the years—in some cases over a decade—that they have been in effect or the impact of changing them now.

¹ These are currently codified at 45 C.F.R. pt. 92.

² 45 CFR 155.120(c)(1)(ii) and 155.220(j)(2), 45 CFR 147.104(e), 45 CFR 156.200(e) and 156.1230(b)(3), 42 CFR 460.98(b)(3) and 460.112(a), 42 CFR 438.3(d)(4), 438.206(c)(2), and 440.262.

1. The proposed rule threatens transgender patients' access to healthcare.

1.1. *Transgender people face pervasive discrimination in healthcare settings.*

Transgender people have been subject to pervasive discrimination, particularly with regard to accessing healthcare. While this discrimination has begun to lessen, transgender people still experience much prejudice and violence. In addition to the direct harm to transgender individuals who are denied care or receive substandard care, this also has a chilling effect: 23% of transgender individuals in 2015 reported that they did not see a doctor when they needed to because of fear of being mistreated.³ Transgender people are also more likely to live with psychological distress, with 40% having attempted suicide in their lifetime, nine times higher than the general population.⁴

In a survey by the Center for American Progress, of transgender people who had visited a doctor or healthcare providers' office in the past year, 29 percent said a doctor or other healthcare provider refused to see them because of their actual or perceived gender identity, 12 percent said a doctor or other healthcare provider refused to give them healthcare related to gender transition; 23 percent said a doctor or other healthcare provider intentionally misgendered them or used the wrong name; 21 percent said a doctor or other healthcare provider used harsh or abusive language when treating them; and 29 percent said that they experienced unwanted physical contact from a doctor or other healthcare provider (such as fondling, sexual assault, or rape).⁵

Many members of the LGBTQ community have a “high degree of

³ 2015 U.S. Transgender Survey Report, at 10, available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁴ *Id.* at 5.

⁵ Center for American Progress, *Discrimination Prevents LGBTQ People from Accessing Healthcare* (January 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

anticipation and belief that they w[ill] face discriminatory care” which ultimately causes many people to not seek the essential care that they need.⁶ For many transgender and gender-nonconforming people the fear of potential negative treatment from health care professionals is even more exacerbated.

1.1. *Eliminating 42 C.F.R. § 92.207(b)(3), the explicit ban denying sex-specific care to transgender individuals, would hinder the enforcement of Section 1557.*

Regulations explicitly prohibiting denials of sex-specific care are important to ensuring that transgender individuals receive equal access to basic preventative care including gynecological visits and cancer screenings. Prior to the 2016 regulations, denials of sex-specific care were rampant. For example, in 2012, a transgender woman who was denied coverage for a mammogram because her insurance company had recorded her sex as male required TLDEF’s assistance to get this critical preventative procedure.⁷ Similarly, OCR investigated the discriminatory exclusion of transgender women from a CDC-funded mammogram program, resulting in the CDC issuing new guidance clarifying that transgender women can participate in the program.⁸ Without clear protections for sex-specific care, transgender people risk having to fight for preventative care even though it is covered under Section 1557’s nondiscrimination requirements.

⁶ Lambda Legal, *When Health Care Isn’t Caring, Lambda Legal’s Survey on Discrimination Against LGBT People and People Living with HIV*, at 6 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring_1.pdf.

⁷ Susan Donaldson James, *Transgender Woman Wins Insurance Coverage for Mammogram*, ABC NEWS, May 1, 2012, <https://abcnews.go.com/Health/transgender-woman-wins-health-coverage-mammogram/story?id=16246219>.

⁸ U.S. Dep’t of Health and Human Services, *OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases*, (Sept. 23, 2015), <https://web.archive.org/web/20150923030557/http://www.hhs.gov/ocr/civilrights/understanding/section1557/casesum.html>.

1.2. *Eliminating 42 C.F.R. § 92.207(b)(4), the explicit ban on categorical exclusions for transgender-related healthcare, would hinder the enforcement of Section 1557.*

TLDEF routinely receives requests for assistance with accessing healthcare. We are currently pursuing litigation against the state employee health plan of North Carolina because it contains an explicit exclusion for transgender-related health care.⁹ As detailed in the complaint, the state health plan removed an exclusion for coverage for gender-affirming healthcare in 2017 in response to the 2016 Section 1557 regulations, but aided by the confusion created by *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016), reinstated it in 2018. One plaintiff had surgery preauthorized in 2017 that was scheduled for 2018 and thus was no longer covered. Another plaintiff had treatment that was begun in 2017, and in 2019 had to purchase an individual plan on the Marketplace in order to continue to receive care. That this lawsuit's claims rely on Section 1557 and not to the regulations points to the reality that a categorical exclusion for transgender-related health care is prohibited under the statute. Eliminating 45 C.F.R. § 92.207(b)(4), which makes that prohibition explicit, may cause covered entities to continue to be misled into engaging in unlawful practices for which they will face liability. Repealing the regulations will only lead to further confusion and litigation that hinders the enforcement of Section 1557.

1.3. *Eliminating 42 C.F.R. § 92.207(b)(5), the explicit ban on discriminatory denials of insurance coverage for transgender-related healthcare, would hinder the enforcement of Section 1557.*

Transgender people face many denials of insurance coverage caused not by categorical exclusions for all transgender-related healthcare, but by the care being deemed not medically necessary. For example, TLDEF currently represents transgender women who have been denied chest reassignment surgery by a major insurance company pursuant to its nationwide clinical policy that states that chest

⁹ *Kadel v. Folwell*, No. 1:19-cv-00272 (M.D.N.C. filed March 11, 2019).

reassignment surgery for transgender women—but not transgender men—is categorically considered to be not medically necessary and therefore excluded. Such a policy is clearly unlawful under 45 C.F.R. § 92.207(b)(5), which prohibits denying or limiting coverage “for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual.” Targeted exclusions for other procedures such as facial gender reassignment surgery or surgery for people who are under age 18 are still commonly maintained by covered entities. TLDEF receives numerous requests for assistance to challenge such denials in public and private insurance, including Medicaid. Retention and enforcement of § 92.207(b)(5) is essential to prohibit these discriminatory denials of healthcare on the grounds of sex.

1.4. *Eliminating 42 C.F.R. § 92.206, which requires equal program access on the basis of sex, would hinder the enforcement of Section 1557.*

Section 92.206 ensures that transgender people can be placed in sex-specific hospital rooms, inpatient mental health facilities, and substance use treatment programs according to their affirmed sex. Not having access to sex-appropriate facilities has dire consequences for transgender people.

1.4.1. *Access to substance use facilities.*

Transgender individuals are at a higher risk of substance abuse than the general population.¹⁰ Transgender individuals face high levels of

¹⁰ Sari L. Reisner et al., *Substance Use to Cope with Stigma in Healthcare Among U.S. Female-to-Male Trans Masculine Adults*, 2 LGBT HEALTH 324 (2015); Lisa Miller & Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOC. FORUM 809, 825 (2015); Larry Nuttbrock et al., *Gender Abuse, Depressive Symptoms, and Substance Use Among Transgender Women: A 3-Year Prospective Study*, 104 Am. J. of Public Health, 2199 (2014); Tiffany R. Glynn and Jacob J. van den Berg, *A Systematic Review of Interventions to Reduce Problematic Substance Use Among Transgender Individuals: A Call to Action*, 2.1 Transgender Health, 45 (2017); Eric G. Benotsch et al., *Non-Medical Use of Prescription Drugs, Polysubstance Use, and Mental Health in Transgender Adults*, 132 Drug and Alcohol Dependence 391 (2013); Paul Kobrak and Bali White, *Transgender Women and HIV Prevention in New York City: A Needs Assessment* (2011); National Research Council, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 218 (2011).

prejudice, discrimination, violence, and other forms of stigma.¹¹ This results in physical effects including increased cortisol levels, anxiety, depression, suicidality, and using substances to cope.¹² Additionally, when transgender people do not have access to transgender-related health care, it is common for people to use substances to self-medicate and attempt to alleviate the symptoms of gender dysphoria.¹³ Appropriate treatment for gender dysphoria is known to resolve substance use problems.¹⁴

Despite high rates of substance use, transgender individuals often encounter difficulties in accessing substance use treatment including discrimination, provider hostility and insensitivity, being barred from participating in sex-specific programs and facilities, and lack of acceptance in sex-appropriate recovery groups. In addition, transgender people who use substances are much more likely to experience challenges completing an education, obtaining stable housing and obtaining employment. Many find that their substance abuse disqualifies them from participating in programs specifically intended to assist them with these challenges.¹⁵

¹¹ Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 SOCIAL SCIENCE AND MEDICINE, 222-231 (2015).

¹² *Id.*; Sari L. Reisner et al., *Gender Minority Social Stress in Adolescence: Disparities in Adolescent Bullying and Substance Use by Gender Identity*, 52 J. OF SEX RESEARCH 243 (2015).

¹³ E.g., Robin M. Mathy, *Transgender Identity and Suicidality in a Nonclinical Sample*, 14 J. OF PSYCHOLOGY & HUMAN SEXUALITY, 47, 61 (2003) ("[T]he significant relation between suicide attempts (but not suicidal ideation) and substance use difficulties suggests some transgender individuals may attempt to cope by 'self-medicating.'"); Beth R. Hoffman, *The Interaction of Drug Use, Sex Work, and HIV Among Transgender Women*, 49 SUBSTANCE USE & MISUSE, 1049 (2014) (noting transgender women experienced high rates of depression and anxiety and "engaged in substance use to cope with mental health problems and stress").

¹⁴ See Jamil Rehman et al., *The Reported Sex and Surgery Satisfactions of 28 Postoperative Male-to-Female Transsexual Patients*, 28 ARCHIVES OF SEXUAL BEHAVIOR 71, 83 (1999).

¹⁵ Nina Kammerer et al., *Transgender Health and Social Service Needs in the Context of HIV Risk*, in TRANSGENDER AND HIV: RISKS, PREVENTION AND CARE (Walter Bockting & Sheila Kirk ed. 2001); K. Clements et al., *HIV Prevention and*

For example, Sabrina Wilson was a 32-year-old homeless transgender woman who was arrested for a drug offense and given the opportunity to participate in a drug treatment program as an alternative to incarceration. The residential program she was assigned to required her to room with men, to use the men's bathroom, and to dress and wear her hair in ways associated with men. The program also denied her participation in women's support groups and she had to attend all-male counseling sessions. These actions constructively forced her out of the facility, which resulted in her being sentenced to 2 1/2 years in jail. When she was released, she successfully filed discrimination charges against the facility under New York law.¹⁶

In response to on-going reports of lack of access to substance use treatment programs such as that experienced by Ms. Wilson, in 2016, TLDEF undertook a survey of 53 substance use treatment programs in New York and found that 47% engaged in some form of anti-transgender discrimination and 34% would refuse to allow a transgender person to be housed according to their true sex. We took our findings to the NYC Commission on Human Rights, which brought successful enforcement actions under the NYC Human

Health Service Needs of the Transgender Community in San Francisco, 3 INT'L J. OF TRANSGENDERISM (1999); J. Sperber et al., *Access to Health Care for Transgendered Persons: Results of a Needs Assessment in Boston*, 8 INT'L J. OF TRANSGENDERISM 74 (2005); T. Nemoto et al., *Health and Social Services for Male-To-Female Transgender Persons of Color in San Francisco*, 8 INT'L J. OF TRANSGENDERISM 5 (2005); Samuel Lurie, *Identifying Training Needs of Health-Care Providers Related to Treatment and Care of Transgendered Patients: A Qualitative Needs Assessment Conducted in New England*, 8 INT'L J. OF TRANSGENDERISM 93 (2004); E.L. Lombardi & G. van Servellen, *Building Culturally Sensitive Substance Use Prevention and Treatment Programs for Transgendered Populations*, 19 J. OF SUBSTANCE ABUSE TREATMENT 291 (2002); U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, *A Provider's Introduction to Substance Abuse Treatment for Lesbian, Gay, Bisexual, and Transgender Individuals* (2012), <https://store.samhsa.gov/system/files/sma12-4104.pdf>; A.D. Marcel, *Determining barriers to treatment for transsexuals and transgenders in substance abuse programs*. Transgender Education Network, Boston (1998).

¹⁶ *Wilson v. Phoenix House*, 978 N.Y.S.2d 748 (N.Y. Sup. Ct. Kings County 2013).

Rights Law.¹⁷

If OCR repeals or continues to refuse to defend or enforce this provision, in jurisdictions without such local laws and administrative agencies to rely on, transgender individuals will continue to be forced to hire a lawyer to enforce their rights under Section 1557 instead of being able to file a complaint with OCR. This will decrease enforcement actions. Section 1557 prohibits such discriminatory treatment on the grounds of sex, and substance use facilities need to be made plainly aware of their obligations to prevent unlawful discrimination and the need for litigation after the harm has already occurred.

1.4.1. Access to hospitals and doctor's offices.

Section 92.206 is also important for placement in hospital rooms. OCR previously enforced these provisions to ensure that transgender people could access care in hospitals.¹⁸ In an enforcement action against a hospital in Brooklyn, OCR entered into an agreement to resolve a discrimination complaint alleging that the hospital housed a transgender woman in a double-occupancy patient room with a male occupant.

But TLDEF continues to receive reports of transgender individuals facing inappropriate treatment and harassment in hospitals and doctor's offices, and there is a need for an administrative complaint process for these claims to be heard by OCR. For example, in 2018, a transgender man who suffers from severe anxiety and depression had

¹⁷ NYC Commission on Human Rights, *NYC Commission on Human Rights Charges Four Substance Abuse Centers with Discriminatory Intake Policies for Transgender Patients* (July 13, 2017), <https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Press%20Release%20-%20Substance%20Abuse%20Centers%20FINAL.pdf>.

¹⁸ Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services Office for Civil Rights and the Brooklyn Hospital Center, Transaction Number: 12-147291 (2015), <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf>; U.S. Dep't of Health and Human Services Office for Civil Rights, The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015), <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf>.

an appointment with a gynecologist in Brooklyn and was to schedule a hysterectomy. The staff member who was told to schedule it laughed in his face as if it were a joke. The doctor did not immediately address this situation, and the patient was severely distressed because of it. The patient was also scheduled for another procedure with the doctor but cancelled it due to his fear and discomfort with seeing the doctor or any other doctor again. Because of situations like these, the regulation ensuring “equal access to its health programs or activities without discrimination on the basis of sex”—and its enforcement by OCR—is vital to ensuring that transgender people can do something as basic as being treated with dignity and respect while being treated or hospitalized for serious health needs.

2. Repealing the 2016 Section 1557 rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

The 2016 implementing rule is sound, has been crucial for transgender patients to be able to access the care that they need, and promotes equal access to medically necessary health services. The 2016 Section 1557 implementing final rule was the product of a lengthy process of deliberation and public input. The rule was developed over the course of six years of study and following two comment periods, with over 25,000 comments from stakeholders, which were overwhelmingly supportive of inclusion of protections against discrimination based on sex stereotyping and gender identity. HHS engaged stakeholders through listening sessions, participation in conferences, and other outreach prior to taking regulatory action.

2.1. *Eliminating 42 C.F.R. § 92.4, the definition section, is not in accordance with widespread court interpretation of discrimination on the basis of “sex” to include transgender status.*

Proposing to eliminate nondiscrimination protections for transgender people contradicts longstanding court precedent. Section 92.4 defines “on the basis of sex” and “gender identity” to make it clear to covered entities that discrimination based on transgender status is unlawful. “Sex” in civil rights law has

universally been interpreted to include discrimination based on sex stereotypes and transgender status in multiple areas including employment (Title VII), education (Title IX), Equal Protection, and Section 1557 itself.

It is well-settled law that anti-transgender discrimination is prohibited sex discrimination under Title IX.¹⁹ Cases to the contrary are readily distinguished.²⁰ Discriminating in insurance on the basis that the care sought is intended to change sex characteristics is inherently sex discrimination.²¹

A robust body of case law similarly holds that discriminatory

¹⁹ See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-47 (7th Cir. 2017) (distinguishing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) and holding that Title IX prohibits treating transgender students differently from non-transgender students), *petition for cert. dismissed*, No. 17-301, 138 S. Ct. 1260 (Mar. 5, 2018); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (denying motion to stay preliminary injunction that prevented school district from excluding transgender girl from the girls’ restroom); *Adams by Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018), appeal docketed, No. 18-13592 (11th Cir. Aug. 24, 2018); *Grimm v. Gloucester County School Board*, No. 4:15-cv-54, 2019 WL 3774118 (E.D. Va. Aug. 9, 2019); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.Supp.3d 704 (D. Md. 2018); *A.H. v. Minersville Area Sch. Dist.*, 290 F.Supp.3d 321 (M.D. Pa. Nov. 22, 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t. of Educ.*, 208 F. Supp. 3d 850, 856-58 (S.D. Ohio 2016), *stay pending appeal denied sub nom.*, *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016). See also *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019) (agreeing that allowing boys and girls who are transgender to use sex-specific restrooms and locker rooms did not raise privacy concerns and “barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.”); *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *28-29 (N.D. Ill. Oct. 18, 2016) (report and recommendation) (same), *adopted by* 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

²⁰ *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657 (W.D. Pa. Mar. 31, 2015) (relying on outdated precedent to hold that Title IX does not prohibit discrimination based on gender identity or transgender status per se); *Texas v. United States*, 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016) (finding in a preliminary injunction that Title IX permitted bathrooms to be separated based on sex in light of specific regulations under Title IX).

²¹ See *Franciscan Alliance, Inc. v. Burwell*, 227 F.Supp.3d 660, 688 (N.D. Tex. Dec. 31, 2016) (“[T]he text, structure, and purpose reveal that the definition of sex in Title IX’s prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.”).

treatment of transgender individuals must needs be sex discrimination under Title VII. In 2012, the Equal Employment Opportunity Commission (EEOC) held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”²² As the Sixth Circuit put it, “[b]ecause an employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex.”²³ The Supreme Court has recognized sex stereotyping as a component of prohibited sex discrimination.²⁴ Federal courts, including the First, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits explicitly or implicitly agree that discrimination against transgender people is actionable sex discrimination.²⁵ The Third and Tenth Circuits have

²² *Macy v. Dep’t. of Justice*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012). See also *Tamara Lusardi v. John McHugh, Sec’y, Dep’t of the Army*, No. 0120133395, 2015 WL 1607756, at *9 (E.E.O.C. Apr. 1, 2015) (finding that “denying transgender individuals access to a restroom consistent with gender identity discriminates on the basis of sex in violation of Title VII.”).

²³ *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018), cert. granted in part sub nom. *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019).

²⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²⁵ See *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (recognizing claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018), cert. granted in part sub nom. *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019) (holding “that discrimination on the basis of transgender and transitioning status violates Title VII); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (“Price Waterhouse...does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual.”); *Hively v. Ivy Tech Cnty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (upholding a Title VII sexual orientation discrimination claim and implicitly rejecting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)); *Hunter v. United Parcel Serv.*, 697 F.3d 697, 702 (8th Cir. 2012) (evaluating a transgender man’s Title VII claim “based on his non-conformity to gender stereotypes or his being perceived as transgendered”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on Title VII cases to conclude that violence against a transgender woman was violence because of gender under the Gender

assumed that a sex stereotyping claim is available to transgender plaintiffs.²⁶ Furthermore, dozens of district courts—both within and outside of the circuits that have explicitly recognized sex discrimination claims by transgender people—have found that anti-transgender discrimination is unlawful sex discrimination.²⁷

Motivated Violence Act); *Chavez v. Credit Nation Auto Sales*, 641 F. App'x 883, 883 (11th Cir. 2016) (“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”) (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011)); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1265–66 (11th Cir. 2017) (Pryor, J., concurring) (noting that “discrimination against a transsexual because she fails to conform to the employer’s view that a birth-assigned male should have male anatomy” constitutes sex discrimination), *cert. denied*, 138 S. Ct. 557 (2017); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008) (noting that “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of ... sex.’”).

²⁶ See *Stacy v. LSI Corp.*, 544 F. App'x 93, 97–98 (3d Cir. 2013); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007).

²⁷ See, e.g., *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (“Employment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.”); *E.E.O.C. v. Rent-a-Center East, Inc.*, 2017 WL 4021130 (C.D. Ill., Sept. 8, 2017) (holding transgender discrimination is actionable under Title VII, relying on 7th Circuit rulings under Title IX (gender identity as sex discrimination) and Title VII (sexual orientation discrimination as sex discrimination) to justify not following an old circuit precedent); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F.Supp.3d 1001, 1014 (D. Nev. 2016) (finding the weight of authority in the 9th Circuit holds discrimination based on transgender status is sex discrimination); *U.S. v. S.E. Okla. State Univ.*, No. 5:15-CV-324, 2015 WL 4606079 at *2 (W.D. Okla. July 10, 2015) (rejecting motion to dismiss premised on *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) and allowing claim based on harassment, health insurance exclusion, and termination based on gender transition to proceed as sex stereotyping discrimination under Title VII); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 789 (D. Md. 2014) (denying motion to dismiss Title VII claim where plaintiff plausibly alleged that she was rejected both “because of her obvious transgendered status” and also her gender nonconformity); *Hughes v. William Beaumont Hosp.*, No. 13-cv-13806, 2014 WL 5511507 (E.D. Mich. Oct. 31, 2014) (transgender woman subjected to disparate treatment where decision maker testified that people would be uncomfortable with “a man acting as a woman”); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d. 653 (S.D. Tex. 2008) (holding that a transgender woman stated a claim under Title VII where the employer rescinded a job offer because she was transgender); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV- 0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (finding an actionable claim where employer advised a transgender woman to avoid wearing overtly feminine attire and ultimately fired her because she failed to act

Anti-transgender discrimination has also been widely regarded as an unconstitutional sex-based classification triggering intermediate scrutiny for Equal Protection claims in the context of schools,²⁸ identity documents,²⁹ prisons,³⁰ the military,³¹ and

like a man).

²⁸ *Whitaker* *supra* note 19, at 1051 (holding that heightened scrutiny used for sex-based classifications applied to school policy requiring transgender student to use bathroom of sex listed on his birth certificate because it “treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that “all of the indicia for the application of the heightened intermediate scrutiny standard are present” for transgender individuals); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.Supp.3d 704, 718-19 (D. Md. 2018) (reviewing *Glenn* and *Whitaker* and determining that heightened scrutiny applied in transgender school bathroom case); *Adams by Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018), *appeal docketed*, No. 18-13592 (11th Cir. Aug. 24, 2018) (same); *A.H. v. Minersville Area Sch. Dist.*, 290 F.Supp.3d 321, 331 (M.D. Pa. 2017) (holding intermediate scrutiny applied in transgender school bathroom case); *Bd. of Educ. of the Highland Local Sch. Dist. supra* note 19, at 872-74 (finding that “transgender status is a quasi-suspect class under the Equal Protection Clause”).

²⁹ *F.V. v. Barron*, 286 F.Supp.3d 1131, 1145 (D. Idaho Mar. 5, 2018) (applying intermediate scrutiny because “transgender people bear all of the characteristics of a quasi-suspect class”).

³⁰ *E.g., Doe v. Mass. Dep’t of Correction*, No. 1:17-cv-12255-RGS, 2018 WL 2994403 at *9 (D. Mass. Jun. 14, 2018) (“[W]here a State creates a classification based on transgender status, the classification is tantamount to discrimination based on sex and is therefore subject to heightened judicial scrutiny.”); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (concluding “that transgender people are a quasi-suspect class”); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (applying intermediate scrutiny where an transgender inmate was denied access to surgery to treat gender dysphoria).

³¹ *Stone v. Trump*, 280 F. Supp. 3d 747, 755 (D. Md. 2017), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018) (applying intermediate scrutiny to decision to exclude transgender individuals from the military); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019) (vacated following change in federal policy) (same); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017), *appeal dismissed*, No. 17-36009, 2017 WL 8229552 (9th Cir. Dec. 30, 2017) (applying intermediate scrutiny to a policy of denying transgender-related healthcare to military service members and granting a preliminary injunction); *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *1 (W.D. Wash. Apr. 13, 2018), *vacated on other grounds and remanded*, 926 F.3d 1180 (9th Cir. 2019) (applying strict scrutiny to transgender people as a protected class where defendants sought to deny transgender-related healthcare to military

employment.³²

Finally, courts have and will continue to find that the Section 1557 itself—Independent of any regulation—protects transgender individuals from discrimination in health care in general,³³ and that transgender insurance exclusions in particular trigger sex discrimination protections under Section 1557.³⁴ Repealing the explicit transgender protections does nothing to change the underlying protections of the statute or court precedent but does create confusion about the obligations of covered entities and fosters a misguided license to discriminate. This harms not only transgender people who will need counsel to access health care, but also the covered entities who rely on HHS regulations to guide their practices.

service members).

³² *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by transgender plaintiff to support claims of gender discrimination on the basis of sex stereotyping “easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution”); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (recognizing discrimination against transgender people as sex discrimination and applying intermediate scrutiny).

³³ *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 at *2 (D. Minn. Mar. 16, 2015); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F.Supp.3d 1090, 1099 (S.D. Cal. Sept. 27, 2017) (“Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections.”).

³⁴ *Cruz v. Zucker*, 116 F.Supp.3d 334, 348 (S.D.N.Y. 2015) (entertaining a sex discrimination claim for transgender people under Medicaid); *Flack v. Wis. Dep’t of Health Servs.*, 328 F.Supp.3d 931 (W.D. Wis. Jul. 25, 2018) (granting a preliminary injunction barring enforcement of Wisconsin Medicaid’s transgender exclusion because such an exclusion denies surgery on the basis of sex in violation of Section 1557); *Flack v. Wisconsin Dep’t of Health Servs.*, No. 18-CV-309-WMC, 2019 WL 1772403, at *12 (W.D. Wis. Apr. 23, 2019) (same); *Boyden v. Conlin*, 341 F.Supp.3d 979, 997 (W.D. Wisc. 2018) (applying Section 1557 to Wisconsin state employee health plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (holding that employer and third-party administrator may be held liable for administering a self-funded plan containing an exclusion for “gender reassignment” treatment).

2.2. *Eliminating 42 C.F.R. § 92.4, the definition section, is not in accordance with widespread court interpretation of “sex” to include gender identity as a biological component of sex.*

The scientific consensus, as recognized by numerous courts, recognizes that “sex” includes myriad physical characteristics that comprise and define one’s sex, which can include hormone levels, genital appearance, reproductive organs, and secondary sex characteristics such as facial hair, fat distribution, muscle mass, breasts, and neurological structure and function.³⁵ One of these components is gender identity: the self-knowledge of one’s sex.³⁶ Everyone—transgender or not—is born with an internal sense of their sex; transgender persons know themselves to be a sex different from that which they were labeled at birth.³⁷ Courts have thus recognized that a transgender person’s sex is not defined by genitalia

³⁵ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 211-13 (D.D.C. 2006) (scientific observation confirms “sex is not a cut-and-dried matter of chromosomes” but rather consists of “different components of biological sexuality”) (citation omitted); *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (gender is determined by seven factors, including “personal sexual identity”); *Maffei v. Kolaeton Indus., Inc.*, 164 Misc. 2d 547, 551-52 (N.Y. Sup. Ct. 1995) (explaining that at least seven variables . . . interact to determine the ultimate sex of an individual,” including gender identity); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018) (“There is scientific consensus that biological sex is determined by numerous elements”). See also Dru M. Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. REV. 943, 951-52 (2015).

³⁶ See *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018), cert. denied 139 S. Ct. 2636 (2019) (“A person’s gender identity is their subjective, deep-core sense of self as being a particular gender.”); accord, e.g., *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1083 (D. Or. 2018) app. pending, No. 18-35708 (9th Cir. 2019).

³⁷ See, e.g., *Karnoski v. Trump*, 926 F.3d 1180, 1188 (9th Cir. 2019) (“Although most people have a gender identity that matches their sex assigned at birth, this is not the case for transgender people, who identify as transgender because their gender identity does not match their birth-assigned sex.”); *Boyden* supra note 34, at 986 (“For purposes of medical diagnosis, as well as increasingly for purposes of common usage, ‘gender identity’ is the internal core sense of one’s own sex, such as male or female. All human beings have a gender identity. . . . ‘Transgender’ means there is an incongruence between a person’s sex at birth (also referred to as one’s ‘natal sex’ in medical texts) or the gender assigned at birth and the individual’s gender identity”).

at birth, but by their gender identity.³⁸ Courts have also long recognized that an individual's gender identity is immutable³⁹ and psychotherapy cannot change a person's gender identity.⁴⁰ It is largely because of this medical and legal consensus that at the federal level, people can correct the sex on their passports, immigration documents, Social Security cards, and federal employee records based on a letter from a doctor without any requirement of

³⁸ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 212-213 (D.D.C. 2006) (recognizing “real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological – interact with each other, and in turn, with social, psychological, and legal conceptions of gender”); *Whitaker* *supra* note 19, at 1053 (acknowledging that in some cases, “it is clear that the marker on the birth certificate would not adequately account for or reflect one’s biological sex, which would have to be determined by considering more than what was listed on the paper”).

³⁹ See, e.g., *Bd. of Educ. of the Highland Local Sch. Dist.* *supra* note 19, at 874 (being transgender is “immutable”); *Adkins* *supra* note 30, at 139-140 (same); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 947 n.20, 953, 953 n.29 (W.D. Wis. 2018) (“Gender identity is innate and generally considered an immutable characteristic.”); *Evanko* *supra* note 28, at 277 n.12 (“[E]xternal sex organs are one (but by no means the only or most accurate) indicia of a person’s sex and gender. . . . [B]eing transgender is not a ‘preference.’ . . . [B]eing transgender has a medically-recognized biological basis . . . it is an innate and non-alterable status.”).

⁴⁰ See, e.g., *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S. 2d 267, 271 (N.Y. Sup. Ct. 1977) (“Medical Science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual’s identification with the other sex or his desire for surgical change.”); *Doe v. State of Minn., Dep’t of Pub. Welfare*, 257 N.W. 2d 816, 819 (Minn. 1977) (“Given the fact that the roots of transsexualism are generally implanted early in life, the consensus of medical literature is that psychoanalysis is not a successful mode of treatment for the adult transsexual.”); *Doe v. McConn*, 489 F. Supp. 76, 77 (S.D. Tex. 1980) (making a factual finding that “[t]reatment of this condition in adults by psychotherapy alone has been futile” and that “[a]dministration of hormones of the opposite sex followed by sex-conversion operations has resulted in better emotional and social adjustment by the transsexual individual in the majority of cases.” Because transsexualism is not a “choice,” “it has been found that attempts to treat the true adult transsexual psychotherapeutically have consistently met with failure.”); *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 473 (Iowa 1983) (“It is generally agreed that transsexualism is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress; psychotherapy is ineffective.”); *In re Heilig*, *supra* note 35, at 78 (“[C]ourts have recognized that psychotherapy is not a ‘cure’ for transsexualism. Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in ‘curing’ the patient.”).

undergoing surgery first.⁴¹ In short, it is widely recognized in law and medicine that one's sex cannot be determined solely by reference to physical sex characteristics. Gender identity is an inherent part of the way law and medicine define "sex," and making attempts to eliminate "gender identity" arbitrary and not in accordance with the statute.

2.3. Section 1557 has protected transgender people from discrimination.

Section 1557 has been instrumental in protecting transgender individuals. Since 2016, the implementing final rule has provided an administrative framework for addressing legitimate complaints for individuals who are denied healthcare or receive substandard healthcare as a result of their transgender status.⁴² This framework has enabled victims to seek redress without the costs and time associated with litigation.⁴³

The 2016 regulations have been an instrumental part of a broader trend in healthcare coverage for transgender people. Since the 2016 regulations were enacted, insurers and employers have continued to expand coverage to include transgender healthcare and have increasingly removed transgender exclusions. At least 20 states now have explicit coverage in their Medicaid plans for gender dysphoria treatments,⁴⁴ and many of those policy changes explicitly reference

⁴¹ See *FAQ About Identity Documents*, Lambda Legal, <https://www.lambdalegal.org/know-your-rights/article/trans-identity-document-faq> (last visited Aug. 13, 2019).

⁴² The Center for American Progress, *The ACA'S LGBTQ Nondiscrimination Regulations Prove Crucial* (March 7, 2018), available at <https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial>.

⁴³ *Id.*

⁴⁴ See National Center for Transgender Equality, Healthcare Action Center (2018), <https://transequality.org/health-care-action-center>; Department of Health and Human Services, Office of MaineCare Services, 10-144 C.M.R., Chapter 101, MaineCare Benefits Manual, Section 90, Chapter II, Physician Services (Jun. 18, 2019) (eliminating transsexual surgery exclusion to comply with § 1557 and implementing regulations), https://www.mainepublic.org/sites/mpbn/files/201906/mainecare_benefits_manual_se

Section 1557 and the implementing regulations as the basis for removing exclusions. Similarly, nineteen states and the District of Columbia prohibit the exclusion of transgender-related care in private insurance policies, with many citing Section 1557 and the 2016 regulations.⁴⁵ But as less than half of the states have explicit Medicaid coverage or explicit transgender insurance protections, the regulations are still very necessary to prevent discrimination.

3. The proposed rule also makes healthcare access for transgender people more difficult in additional ways.

3.1. *The proposed rule will impede healthcare access for people with HIV/AIDS and other serious or chronic conditions.*

Transgender people are up to five times more likely than the general population to be living with HIV/AIDS.⁴⁶ Transgender women of color are particularly likely to be at risk, with nearly one in five black transgender women living with HIV.⁴⁷

Section 1557 and the 2016 implementing regulations prohibit health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with HIV/AIDS or other serious/chronic conditions. The proposed rule seeks to exempt most health insurance plans from Section 1557's nondiscrimination protections and eliminate the regulation prohibiting discriminatory benefit design and marketing, which could result in health insurers excluding benefits or designing their prescription drug formularies in a way that limits access to medically necessary care for those living with HIV and other chronic conditions.

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⁴⁵ See Transcend Legal, *State Health Insurance Laws & Guidance*, <https://transcendlegal.org/state-health-insurance-laws-and-guidance> (listing bulletins, regulations and statutes that prohibit exclusions).

⁴⁶ 2015 U.S. Transgender Survey Report, *supra* note 3, at 10.

⁴⁷ *Id.*

3.2. *The proposed rule will make it much harder for people to understand their legal rights and will disproportionately harm people who are limited English proficient.*

The proposed rule will make it more challenging for patients—including transgender people who are also limited English proficient—to understand their healthcare rights under federal law. Many individuals may not know about their rights, how to request language services, or how to file a complaint if they face discrimination. By eliminating tagline requirements and notice standards, the proposed rule will undermine access to healthcare, health insurance, and legal redress for vulnerable communities.

3.3. *The proposed rule will make it much harder for transgender people who need access to reproductive care.*

The proposed rule also threatens access to reproductive healthcare. LGBTQ people, including transgender, non-binary, and gender nonconforming people, need access to reproductive healthcare and coverage, including abortion, contraception, pregnancy care, and fertility services, free from discrimination.

The proposed rule attempts to unlawfully incorporate a broad religious exemption to 1557's protections against discrimination on the basis of sex. The Department's attempts to add a religious exemption are contrary to the express purpose of Section 1557 and violate the plain language of the statute. Adding a religious exemption opens the door for discrimination and emboldens healthcare providers to deny patients care, threatening the health and well-being of LGBTQ patients and patients seeking reproductive healthcare.

4. Conclusion

The proposed rule will harm transgender individuals by engendering confusion about the state of the law and promoting discrimination by providers and insurers. It also contradicts existing jurisprudence and medical consensus, causing inconsistency in access to healthcare and discriminatory denials of medically necessary care. We respectfully

request that the proposed rule be withdrawn in its entirety. If you have any questions, please contact David Brown, Legal Director (646) 862-9396, dbrown@transgenderlegal.org).

Sincerely,

Transgender Legal Defense & Education Fund