Lambda Legal
making the case for equality

August 13, 2019

VIA Electronic Submission

Hon. Alex M. Azar, II, Secretary
U.S. Department of Health and Human Services
Attention: 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: **Agency Notice of Proposed Rulemaking; Public Comment Request; Nondiscrimination in Health and Health Education Programs or Activities RIN 0945-AA11**

To Whom It May Concern:

Lambda Legal Defense & Education Fund, Inc. ("Lambda Legal") submits these comments in response to the U.S. Department of Health and Human Services ("HHS" or "Department") and the Center for Medicaid and Medicaid Services ("CMS") Notice of Proposed Rulemaking ("Proposed Rule" or "NPRM") to express our opposition to the proposed rule entitled "Nondiscrimination in Health and Health Education Programs or Activities," published in the Federal Register on July 14, 2019.

Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer ("LGBTQ") people and everyone living with HIV through impact litigation, education, and policy advocacy. The matters addressed in the Proposed Rule are of great concern to Lambda Legal because LGBTQ people and those living with HIV already face widespread discrimination in health care services, and violations of their personal autonomy regarding reproductive decisions, sexual health, gender expression, transition-related care, HIV care and other matters. Lambda Legal has been a leader in the fight against this discrimination and, accordingly, has submitted a series of comments to HHS providing extensive documentation of this discrimination, its serious health effects, the ways that current federal law must be understood as forbidding this mistreatment, and the ways that additional conscience-based exemptions to health standards and federal would wrongfully endanger LGBTQ people and others.[1] Because Lambda Legal remains committed to protecting the rights of LGBTQ people seeking health care and to ensuring that medical professionals and healthcare facilities understand and respect their responsibility to treat LGBTQ patients fairly, Lambda Legal opposes the Proposed Rule for the reasons explained in these comments.[2]

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[1] *See, e.g.,* Lambda Legal Public Comment in Response to the Proposed Rule, Protecting Statutory Conscience Rights in Health Care, RIN 0945-ZA03 (submitted March 27, 2018) ("Lambda Legal Religious Exemption Comments"), *available at* https://www.lambdalegal.org/in-court/legal-docs/dc_20180327_comments-hhs; *Lambda Legal Comments on Proposed Rule 1557 Re: Nondiscrimination in Health Programs and Activities, 1557 NPRM (RIN 0945-AA02)* (submitted Nov. 9, 2015) ("Lambda Legal 1557 Comments"), *available at* https://www.lambdalegal.org/in-court/legal-docs/hhs_dc_20151117_letter-re-1557; *Lambda Legal Comments on Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities (RIN 0945-AA02 & 0945-ZA01)* (submitted Sept. 30, 2013) ("Lambda Legal Nondiscrimination Comments"), *available at* https://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services.

[2] Lambda Legal also opposes the Proposed Rule for the reasons set forth in the comments submitted by the HIV Health Care Access Working Group – a coalition of over 100 national and community-based HIV service organizations, of which Lambda

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I. Introduction

Lambda Legal vigorously opposes the Proposed Rule. LGBTQ people already experience widespread discrimination in health care settings. Although HHS cannot change the law through the Proposed Rule, the Proposed Rule sends a dangerous message to those who wish to discriminate that they can do so without consequence, which would cause direct harm and literally endanger the lives of LGBTQ people and other marginalized populations. By improperly inviting discrimination contrary to the statute, the Proposed Rule also would cause drastic limitations in access to health care coverage for LGBTQ people, while creating confusion among health care providers about their rights and obligations under the law. The Proposed Rule also would encourage hospitals to deny care to LGBTQ people, and embolden insurance companies to deny transgender people coverage for health care services that they cover for non-transgender people.

It is important to note the context within which the NPRM has been promulgated. HHS issued the Proposed Rule on the heels of two and half years of relentless efforts by this administration to rollback or eliminate equality protections for LGBTQ people in a broad range of contexts. There are too many examples of these efforts to catalogue in this comment, but they are publicly documented.[3] These systematic

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Legal is a member, which represents HIV medical providers, public health professionals, advocates, and people living with HIV who are all committed to ensuring access to critical HIV-related health care and support services.

[3] *E.g.*, Human Rights Campaign, *Trump's Timeline of Hate*, *available at* https://www.hrc.org/timelines/trump; National Center for Transgender Equality, *The Discrimination Administration*, *available at* https://transequality.org/the-discrimination-administration; GLAAD, *Trump Accountability Project*, *available at* https://www.glaad.org/trump.

attempts to facilitate discrimination against LGBTQ people have especially marked out and targeted transgender people. The administration, for example, has sought to eliminate information about transgender elders,[4] to exclude transgender students,[5] to deny transgender workers equal opportunity,[6] to ban transgender service members,[7] to bar transgender immigrants,[8] and to leave transgender prisoners without basic personal needs and subject to sexual and other violence.[9] Now, as the NPRM makes clear, the administration proposes to facilitate denials of medically necessary care to transgender patients.

In an administration that seems to find new ways to target LGBTQ people (and transgender people in particular) on a weekly basis, there is no federal agency that has invited more widespread harm to LGBTQ people than HHS, the agency actually charged by Congress with enhancing the health and well-being of all Americans.[10] Instead of advancing the health and well-being of ***all*** Americans, however, under this administration, HHS is attempting the opposite. For example, HHS recently issued a final rule that invites health care providers to deny LGBTQ people, and most explicitly transgender people, health care based on a health provider's religious or personal beliefs, regardless of the medical standard of care.[11] The Department also has repeatedly attempted to erase information about LGBTQ people. For example, the Department altered its website to remove language referencing protections for LGBTQ people and instructed CDC staff not to even use the word "transgender."[12] HHS also has repeatedly rolled back data collection efforts which are critical for understanding and then attempting to meet the needs of LGBTQ people.[13]

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[4] Health and Human Services Agency, Administration for Community Living Elimination of data collection survey for transgender elders on the National Survey of Older Americans Act, *available at* https://www.federalregister.gov/documents/2018/02/20/2018-03390/agency-information-collection-activities-submission-for-omb-review-comment-request-redesign-of.

[5] John Riley, *Department of Education Issues New Guidance on Transgender Students*, (June 16, 2017); OCR Instructions to the Field re Complaints Involving Transgender Students, *available at* https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html.

[6] Office of the Attorney General Memo to U.S. Attorneys regarding the Revised Treatment of Transgender Discrimination Claims under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), *available at* https://www.justice.gov/ag/page/file/1006981/download.

[7] Office of the Deputy Secretary of Defense, Directive Memo with regard to Military Service by Transgender Persons (Mar. 12, 2019), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-19-004.pdf.

[8] Ben Kesslen, *Dozens of House Members Demand Better Treatment of Transgender Asylum Seekers in ICE Custody* (Aug. 1, 2019), *available at* https://www.nbcnews.com/politics/immigration/dozens-house-members-demand-better-treatment-transgender-asylum-seekers-ice-n1037471.

[9] U.S. Department of Justice, Federal Bureau of Prisons, Change to the Transgender Offender Manual (May 11, 2018), *available at* https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf.

[10] See HHS Mission Statement, *available at* https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission

[11] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 FR 23170 (May 21, 2019), *available at* https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority (expanding existing conscience protections to include health care treatment for transgender people).

[12] *E.g.*, Lena H. Sun and Juliet Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity* (Dec. 15, 2017) WASHINGTON POST, *available at* https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_term=.6784cceec03e.

[13] *E.g.*, Department of Health and Human Services, Adoption and Foster Care Analysis and Reporting System NPRM (Apr. 19, 2019), *available at* https://www.federalregister.gov/documents/2019/04/19/2019-07827/adoption-and-foster-care-analysis-and-reporting-system.

Most of the anti-LGBTQ policy changes being attempted by HHS—including the Proposed Rule—arise out of its Office of Civil Rights ("OCR"), headed by its director, Roger Severino. For years Mr. Severino has made no secret of his contempt for LGBTQ people, especially transgender people.[14] For example, before taking the helm of OCR, Mr. Severino was on record that he believes transgender military personnel serving openly "dishonors" the service of other service members.[15] He referred to Gavin Grimm, a male transgender student in a successful Title IX case,[16] as "a gender-dysphoric teen girl."[17] With particular reference to the Proposed Rule, Mr. Severino has referred to the existing health care nondiscrimination protections for transgender people as "special privileges" and propagated the baseless myth that doctors will be forced to enter new fields of medicine against their will.[18]

Consistently with this evident personal antipathy to transgender people as a class, Mr. Severino also has repeatedly disparaged the clinical effectiveness of transition-related health care.[19] Mr. Severino, however, is not a physician and he cites only his opinion and discredited studies that—as with the NPRM—ignore a mountain of both medical and legal authority in order to reach arbitrary, unsupportable and harmful conclusions. Nearly all major medical organizations in the United States have issued position statements confirming based on decades of studies that access to and insurance coverage for transition-related health care is medically necessary for many transgender patients and fully in keeping with contemporary standards of medicine, science, and ethics. For example, the American Medical Association has repeatedly affirmed the propriety of transition-related care in both the civilian and the military context.[20] Likewise, the American Psychiatric Association[21] and the American Psychological Association,[22] as well as a host of other medical organizations, also have issued similar position statements.[23] In fact, no credible major medical organizations have taken a contrary position.

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14 Charles Ornstein, *Heritage Foundation Alum Critical of Transgender Rights to Lead HHS Civil Rights Office* (Mar. 24, 2017), *available at* https://www.propublica.org/article/heritage-foundation-critical-transgender-rights-HHS-civil-rights-office; GLAAD, Trump Accountability Project, Profile of Roger Severino, Director of Office of Civil Rights (at Dept. of HHS), *available at* https://www.glaad.org/tap/roger-severino.

15 Roger Severino, *Pentagon's Radical New Transgender Policy Defies Common Sense* (July 1, 2016), CNSNEWS.COM, *available at* https://www.cnsnews.com/commentary/roger-severino/pentagons-radical-new-transgender-policy-defies-common-sense.

16 *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15CV54, 2019 WL 3774118 (E.D. Va. Aug. 9, 2019).

17 Jim DeMint & Roger Severino, *Commentary: Court Should Reject Obama's Radical Social Experiment* (Dec. 14, 2016), *available at* https://www.heritage.org/gender/commentary/court-should-reject-obamas-radical-social-experiment.

18 Roger Severino, *Why Obamacare Might Force Doctors to Perform Sex-Reassignment Surgeries* (Jan. 13, 2016), *available at* https://www.dailysignal.com/2016/01/13/why-obamacare-might-force-doctors-to-perform-sex-reassignment-surgeries/.

19 Ryan Anderson & Roger Severino, *Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians*, Heritage Foundation Backgrounder, No. 3089 (Jan. 8, 2016), *available at* https://www.heritage.org/health-care-reform/report/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience.

20 American Medical Association House of Delegates Resolution 122, *available at* http://www.imatyfa.org/assets/ama122.pdf; also see AMA Statement on Pentagon's ban on Transgender in the Military (Apr. 11, 2019), *available at* https://www.ama-assn.org/press-center/ama-statements/ama-statement-pentagons-ban-transgender-military.

21 *See* Professional Organization Statements Supporting Transgender People in Health Care, Lambda Legal (last visited Aug. 13, 2019), *available at* https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf.

22 *Id.*

23 *Id.*

Accordingly, since before the Affordable Care Act was enacted almost a decade ago and increasingly thereafter, health insurance companies have been eliminating their prior, discriminatory exclusions of coverage for transition-related health care. This trend is accelerating both with plans offered through the exchanges and those offered by employers, and insurers have reported no problems with the provision of coverage for this medically-necessary health care. Indeed many states now prohibit insurers from offering plans that discriminate against transgender people.[24]

While equality and a desire to avoid discrimination should drive decisions about benefit coverage, the case for the provision and coverage of transition-related health care is also economically sound. Over and over again, reputable cost studies have shown that the cost of providing this care is less than one-tenth of one percent of an entity's health budget. For example, a study commissioned by the U.S. military concluded that costs associated with providing health care to transgender service members was considered by a former Secretary of the Navy to be "budget dust, hardly even a rounding error."[25] Likewise, research from the Johns Hopkins Bloomberg School of Public Health calculated that the costs would be fewer than two pennies per month for every person with health insurance coverage in the United States.[26] A cost analysis of the City and County of San Francisco's coverage of transition-related surgeries found that costs in the first five years to both insurers and employers were low, averaging between $0.77 and $0.96 per year per enrollee, and resulted in no surcharge or premium increases.[27] Employers who provide health care coverage for their transgender employees likewise report very low costs, if any, from adding transition-related coverage to their health benefits plans or from actual utilization of the benefit after it has been added – with many employers reporting no costs at all.

Contrary to this information readily available to the public, and the information compiled both by HHS when preparing the 2016 Final Rule and by the Armed Forces when preparing to permit open military service by transgender people, this administration has grossly exaggerated the cost of transition-related health care coverage in order to enshrine discrimination.[28] The discriminatory comments by OCR leadership together with this administration's shockingly overt record of anti-transgender bias make plain that this Proposed Rule is the product of biased ideology, not medical or other evidence. Contrary to the statutory responsibility of HHS to enhance the health and well-being of all Americans, this Proposed Rule illegitimately aims instead to embolden those providers and insurers who wish to withhold medically needed heath care from LGBTQ patients.

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[24] *See States with health insurance bulletins prohibiting discrimination against transgender people*, Transgender Law Center (last updated May 23, 2016), *available at* https://transgenderlawcenter.org/resources/health/bulletins.

[25] See Declaration of Raymond Edwin Mabus, Jr., former Secretary of the Navy, In support of Plaintiff's Motion for Preliminary Injunction, No. 17-cv-1597 (CKK), *Doe v. Trump* (Aug. 28, 2017), *available at* http://www.nclrights.org/wp-content/uploads/2017/08/Mabus-Declaration-1.pdf..

[26] William V. Padula, Shiona Heru, Jonathan D. Campbell, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis* (Oct. 19, 2015), *available at* https://link.springer.com/article/10.1007%2Fs11606-015-3529-6.

[27] State of California Department of Insurance Economic Impact Assessment (Apr. 13, 2012), *available at* https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

[28] *See, e.g.,* Asher Stockler, *Legal Experts Say Trump's Latest Freewheeling Interview Could Undermine his Transgender Military Ban Case*, NEWSWEEK (June 6, 2019), *available at* https://www.newsweek.com/donald-trump-interview-transgender-military-ban-1442679.

Against this overwhelmingly discriminatory federal policy backdrop, LGBTQ people, and especially transgender people, already have been experiencing serious and persistent barriers to accessing health care coverage,[29] which would only worsen if the Proposed Rule were to be given effect. For example, one in four transgender people report experiencing discrimination, such as being denied coverage for care related to transition, and one-third report verbal harassment or refusal of treatment.[30] As a result of this discrimination, many transgender and nonbinary people avoid seeking health care altogether. According to the 2015 U.S. Transgender Survey, 23% did not seek care when they needed it from fear of being mistreated.[31] These persistent experiences and delays in preventive treatment can lead many people to avoid seeing a doctor altogether, which inevitably leads to serious negative long-term health care outcomes.[32]

In addition to the statistical evidence showing the glaring disparities, the requests for assistance that Lambda Legal receives via our Legal Help Desk and publicly reported examples of refusals of care[33] demonstrate the extreme harm that LGBTQ people already experience, which unavoidably would be exaggerated were the Proposed Rule to be given effect. Below are only a few examples that show the range of harmful discrimination that LGBTQ people regularly experience regarding health care treatment:

- Tyra Hunter, a transgender woman who was seriously injured in a car accident outside Washington D.C who later died from her wounds was jeered at by ambulance workers who refused to her.[34]

- Robert Eads, a transgender man with ovarian cancer whom 20 separate doctors wouldn't treat; one said the diagnosis should make Eads "deal with the fact that he is not a real man."[35]

- K.S., a transgender woman in Dallas who sought help because she had become suicidal, recounted: On several occasions, I was asked about my genitals as well as other inappropriate questions about my transgender status. When I complained…a nurse told me that I should just "expect to be treated like this." On multiple occasions, they made me sleep on the hallway floor rather than in a room, and when I was finally given a room, it was an isolation room…I was also prevented from using the bathroom for hours at a time…[and]denied use of [my electric shaver] for a week, which caused me to grow a beard. The staff of the facility discussed my transgender status loudly…, and as a result, within the first couple of days of my arrival all of the patients around me knew, which caused me to suffer sexual harassment from two male patients. K.S. Statement. Due to this treatment, K.S. attempted suicide twice while at that facility.[36]

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[29] See extensive material submitted to HHS in Lambda Legal's prior comments, as referenced *supra* in note 1.

[30] James, S.E., Herman, J.L., Rankin, S., Keisling, M., Mottet, L. & Anafi, M. (2016) (p. 92). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality, *available at* http://www.ustranssurvey.org/reports.

[31] *Id.*

[32] See discussions in Lambda Legal's prior comments, referenced *supra* in note 1.

[33] See examples reported in detail in Lambda Legal's prior comments, referenced *supra* in note 1.

[34] *See* Health Provider Discrimination, Lambda Legal (last visited Aug. 13, 2019), *available at* https://www.lambdalegal.org/know-your-rights/article/trans-health-care-discrimination.

[35] *Id.*

[36] *See* Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., Family Equality Council, *et al.*, in Support of Respondents (Oct. 30, 2017), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2017 WL 5127317.

- M.H., a gay man in New York City reported: I was treated roughly physically and emotionally and called a faggot on more than one occasion by a health care aide. At one point, I was dragged down the hall roughly in an office chair, because they said they were short on beds, and I fell out of the chair…I was left on the floor, where I went into convulsions and urinated on myself. I was later told I had a seizure and a cyanotic episode…I could hear the nurse running toward me yelling that she was going to lose her job over this. The health aide responded: "This junky faggot isn't going to make you lose your job."[37]

Despite this persistent, appalling reality for transgender people in particular, the Proposed Rule seeks to roll back and limit the existing rule regarding "Nondiscrimination in Health and Health Education Programs or Activities" (hereinafter "2016 Final Rule"), promulgated on May 18, 2016. The 2016 Final Rule represents the culmination of an extensive process. It was developed over the course of six years and took in two notice and comment periods and received over 25,000 comments which overwhelmingly confirmed both the legal foundation and the practical need to include explicit protections against discrimination based on sex stereotyping and gender identity in the regulations. Since its promulgation, the 2016 Final Rule has successfully led to a dramatic decrease in discriminatory policies and practices.[38] A recent study of 37 states in the federal marketplace showed that 95% of plans did not contain blanket exclusions of transition-related care in 2019.[39] If finalized, the Proposed Rule would undermine this progress in eradicating health care discrimination against LGBTQ people in a broad array of health care programs and entities by inviting insurers and providers once again to discriminate against them, while also discouraging LGBTQ people from seeking health care in the first place.

It must be noted that an agency rule that amends an existing rule is subject to review under the Administrative Procedures Act (APA).[40] Proposed rules must examine the relevant information and articulate a satisfactory explanation for the NPRM, including a "reasoned analysis for the change."[41] The APA analysis of whether an agency action was arbitrary and capricious and therefore unlawful includes an examination of whether the agency's explanation runs counter to the evidence before it.[42] Here, as demonstrated above and in further detail below, HHS has failed utterly to provide a reasoned analysis for its proposed changes and the course it has charted, which runs directly counter to the evidence before the agency and to its statutory mandates.

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[37] *Id.*

[38] Sharita Gruberg and Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, Center for American Progress (Mar. 7, 2018), *available at* https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/.

[39] Out2Enroll, Summary of Findings: 2019 Marketplace Plan Compliance with Section 1557, *available at* https://out2enroll.org/out2enroll/wp-content/uploads/2018/11/Report-on-Trans-Exclusions-in-2019-Marketplace-Plans.pdf. This is consistent with summaries from 2017 and 2018, *available at* https://out2enroll.org/out2enroll/wp-content/uploads/2015/10/Report-on-Trans-Exclusions-in-2017-Marketplace-Plans.pdf https://out2enroll.org/out2enroll/wp-content/uploads/2017/11/Overview-of-Trans-Exclusions-in-2018-Marketplace-Plans-1.pdf.

[40] 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

[41] *Id.*

[42] *Id.*

II. The NPRM Fails to Provide a Reasoned Explanation for Repealing the Definition of "On the Basis of Sex."

The 2016 Final Rule explicitly prohibits discrimination on the basis of sex, including discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping and gender identity.[43] While Section 1557 remains the law, the NPRM attempts to significantly alter the ACA's sex discrimination protections by eliminating the 2016 Final Rule's definition of sex discrimination altogether, and does not attempt to provide a different definition.[44]

Instead, the NPRM simply announces that interpreting Title IX to prohibit gender identity discrimination was a "novel theory" when HHS promulgated the 2016 Final Rule.[45] In support of this inaccurate generalization, the NPRM points to non-binding language from a five-page district court decision issued in 2017 (a year after the 2016 Final Rule was issued), which noted the lack of controlling U.S. Supreme Court precedent recognizing gender identity discrimination as prohibited under Section 1557.[46] But the dicta referenced in the NPRM was not cited in that case.[47] Even if it were, simply because the U.S. Supreme Court has not explicitly confirmed a legal interpretation does not mean that interpretation is wrong. Equal weight should be given to the Supreme Court's lack of an explicit holding that discrimination based on gender identity or sexual orientation is *not* a prohibited form of discrimination under Section 1557.

More to the point, the NPRM asserts that the 2016 Final Rule exceeded its legal authority under Section 1557 by adopting an interpretation of civil rights law that was "incorrect."[48] But the Department fails to provide a coherent legal analysis that would explain *why* that interpretation was "incorrect." The 2016 Final Rule grounded its interpretation of "sex" on a detailed survey of the extensive existing case law, which has continued to expand with additional supporting case law since the 2016 Final Rule was issued.[49] The NPRM however, offers only two dismissive paragraphs, which fail to address or even acknowledge the substantial body of well-reasoned contrary authority. Instead, the Department relies almost entirely on one preliminary injunction issued by a lone district court,[50] which similarly ignored extensive, contrary legal authority, and which was not appealed and considered at the Circuit Court level.[51]

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[43] 45 C.F.R. § 92.4.

[44] 84 FR 27857 ("Because of the likelihood that the Supreme Court will be addressing the issue in the near future, the Department declines, at this time, to propose its own, definition of "sex" for purposes of discrimination on the basis of sex in the regulation.").

[45] The Department refers to discrimination against LGBTQ people as a "novel theory" on nine separate occasions, always without addressing the contrary authority.

[46] 84 FR 27853 (*see, e.g., Baker v. Aetna*, 228 F. Supp. 3d 764, 768-69 ("noting no controlling U.S. Supreme Court legal precedent recognizing gender identity as prohibited discrimination under Section 1557.").

[47] *Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 769 (N.D. Tex. 2017) (the decision simply states that "the Fifth Circuit has not extended *Hopkins'* Title VII reasoning to apply to any statute referenced in § 1557").

[48] 84 FR 27849.

[49] *See* 81 FR 31387-31392 (2016).

[50] *Franciscan Alliance, Inc., et al.* v. *Burwell, et al.,* 227 F. Supp. 3d 660 (N.D. Tex. 2016). Judge O'Connor, who recently gained notoriety for issuing a declaratory judgment striking down the entire Affordable Care Act, has issued nationwide injunctions effecting the rights of LGBTQ people on numerous occasions. In addition to the injunction in this case, Judge O'Connor issued a nationwide injunction in 2015 blocking federal rules that would have provided Family and Medical Leave Act (FMLA) to same-sex couples. *Texas v. United States*, 95 F. Supp. 3d 965 (N.D. Tex. 2015). Judge O'Connor also issued a nationwide preliminary

For example, beyond citing the *Franciscan Alliance* injunction, the NPRM fails to discuss the growing number of authorities that have held that the ACA's prohibition against sex discrimination encompasses protections for transgender people.[52] In addition, the NPRM cites Title VII case law to support its position but ignores the extensive, long-standing countervailing Title VII case law concluding that discrimination on the basis of gender identity *is* prohibited by Title VII.[53] This one-sided presentation is inaccurate at best and gives no indication that the Department has grappled with the existing case law as it is statutorily required to do, much less that its analysis is "reasonable."

There is even less excuse for this inaccurate legal presentation because HSS was on explicit notice about the case law, having been informed by advocacy organizations, including Lambda Legal, during their OMB meetings with the Department.[54] Equally concerning is the failure of the Department to address (and in some cases even to cite) the extensive countervailing appellate case law contradicting the Department's position that the 2016 Final Rule was "incorrect."[55] In addition to the Circuit Courts of Appeal that have held that employment discrimination against transgender people is a form of sex discrimination, three other

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injunction enjoining the Title IX student guidance protecting transgender students. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), order clarified, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016).

[51] 84 FR 27855.

[52] *See*, *e.g.*, *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (D. Minn. Sept. 20, 2018) (holding that a health care plan that excluded health services related to gender dysphoria discriminated against transgender people in violation of the Health Care Rights Law (Section 1557 of the Affordable Care Act), which prohibits discrimination in health care); *Boyden v. Conlin,* 341 F. Supp. 3d 979 (W.D. Wis. 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause); *Flack v. Wisconsin Department of Health Services*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018) (holding that Medicaid exclusion targeting transgender people constitutes sex discrimination under Affordable Care Act and Equal Protection Clause); *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y. 2016) (holding that an exclusion for transition related health care violates the Affordable Care Act); *Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act).

[53] Federal District Court decisions holding that Title VII's prohibition against sex discrimination encompasses gender identity discrimination include, inter alia: *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Equal Employment Opportunity Comm'n v. A & E Tire, Inc.*, 325 F. Supp. 3d 1131 (D. Colo. 2018): *Parker v. Strawser Construction*, 307 F. Supp. 3d 744 (S.D. Ohio Apr. 25, 2018); *E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F. Supp. 3d 952 (C.D. Ill. Sept. 8, 2017); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1005 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. Mar. 18, 2016); *Doe v. State of Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *United States v. Se. Oklahoma State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015); *Finkle v. Howard County.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. Sept. 19, 2008); *Lopez v. River Oaks Imaging & Diagnostic Group. Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. CIV.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E (SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

[54] *See* EO 12866 Meetings for RIN 0945-AA11, *available at* https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=201810&rin=0945-AA11&viewRule=true.

[55] *See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F. 3d 560 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir.2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. March 25, 2005); *Smith v. City of Salem*, 378 F. 3d 566 (6th Cir. Aug. 5, 2004).

federal circuit courts have held that statutes similar to Title VII prohibiting discrimination based on sex also encompass gender identity discrimination.[56]

Moreover, in addition to the five federal circuit courts of appeals and the dozens of district courts that have held that sex discrimination bans cover gender identity discrimination, all of which the Department unreasonably failed to acknowledge, the Department also failed to acknowledge the multiple E.E.O.C. decisions similarly holding that sex discrimination bans cover gender identity discrimination.[57] In sum, despite this nearly overwhelming body of federal case law concluding that Title VII and other federal statutes forbid gender identity discrimination because it is a form of sex discrimination, the Department rests almost entirely upon the lone *Franciscan Alliance* injunction and one circuit court decision, the reasoning of which has been superseded.[58]

The NPRM also fails entirely to provide any justification for its removal of sex-stereotyping as a form of sex discrimination, which also was included in the 2016 Final Rule.[59] In addition to gender identity discrimination being a form of sex discrimination because it is based on sex-based considerations, much of the case law holding that discrimination against LGBTQ people is a form of sex discrimination is based upon Supreme Court case law interpreting "sex" discrimination to include sex-stereotyping. The Department's proposal simply to eliminate that protection is obviously unreasonable. The 2016 Final Rule extensively surveyed and examined existing law and correctly concluded that gender stereotyping is a prohibited form of discrimination based upon Supreme Court and other case law precedent.[60] The Proposed Rule unreasonably ignores this precedent without discussion. This improper approach likely will invite some health providers to believe, mistakenly, that they are at liberty to turn patients away because they do not conform with traditional sex stereotypes and others' perceptions about their sex.

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[56] *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (holding that Title IX's prohibition against sex discrimination encompasses discrimination against transgender people), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260415 (2018); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. June 8, 2000) (holding that the Equal Credit Opportunity Act's prohibition against sex discrimination encompasses discrimination based on gender identity); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000) (holding that the Gender Motivated Violence Act's prohibition against gender discrimination encompasses gender identity discrimination).

[57] *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015); *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014); *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

[58] The Department cites *Etsitty v. Utah Transit. Auth.*, 502 F.2d 1215 (10th Cir. Sept. 20, 2007) as a case supporting its view, but *Etsitty* relied upon a Seventh Circuit decision (*Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) which has been superseded by the reasoning of *Whitaker v. Kensohsa Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (clarifying that *Ulane*'s reasoning "cannot and does not foreclose Ash and other transgender students from bringing sex-discrimination claims based upon a theory of sex stereotyping as articulated four years later by the Supreme Court…"); *see also*, *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (clarifying that a sex discrimination claim based on gender stereotyping brought by a transgender litigant pursuant to the Fair Housing Act is cognizable in the Tenth Circuit under *Price Waterhouse*).

[59] 45 C.F.R. § 92.4.

[60] 81 FR 31387 ("OCR also believes that its inclusion of gender identity is well grounded in the law and disagrees with those commenters who argued to the contrary. As the Supreme Court made clear in *Price Waterhouse v. Hopkins*, in prohibiting sex discrimination, Congress intended to strike at the entire spectrum of discrimination against men and women resulting from sex stereotypes."); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

While an erasure of transgender people from Section 1557's protections would certainly send a message to health care providers that it is perfectly acceptable to discriminate against transgender patients, the NPRM is similarly dangerous (and incorrect) in proposing to send a message that it is acceptable to turn patients away because they do not conform with traditional gender stereotypes because they are lesbian, gay, or bisexual. As explained at length in Lambda Legal's prior comments,[61] lesbian, gay, bisexual and queer people already experience significant discrimination in health care. For example, seven percent of LGBQ people report having had a provider use abusive language when treating them and seven percent report experiencing unwanted physical contact from a provider, including fondling, sexual assault or rape.[62] In addition to applying sex-stereotyping analysis to the discrimination claims presented by transgender people, federal courts have also confirmed that sex-based considerations and sex-stereotyping protections also apply to sexual orientation discrimination, which similarly must be recognized as a form of unlawful sex discrimination.[63] The EEOC has also definitively interpreted Title VII to cover sexual orientation-related discrimination as sex discrimination prohibited both as an unavoidably sex-based consideration and as necessarily involving illicit sex stereotyping.[64]

Also, without discussion or analysis, the NPRM proposes to eliminate from the 2016 Final Rule the provision that prohibits a covered entity from discriminating against an individual based on those with whom they are known or believed to have a relationship or to be associated.[65] As with the inclusion of gender identity and sex-stereotype protections, this provision was grounded in an examination and understanding of the existing case law. For example, many courts have recognized an actionable race discrimination claim based on the race of an individual with whom the plaintiff is associated.[66] These cases

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[61] *See* note 1, *supra*.

[62] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), *available at* https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

[63] *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123 (2d Cir. 2018), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339 (7th Cir. 2017). Numerous district court decisions have also concluded that sexual orientation discrimination is forbidden sex discrimination. *See, e.g., Boutillier v. Hartford Pub. Schs.*, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cty., Bd. Of Cty. Comm'rs,* 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Isaacs v. Felder Servs., Inc.*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Koren v. Ohio Bell Tel Co.* 894 F. Supp. 2d 1032 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

[64] *See, e.g., Baldwin v. Foxx*, 2015 WL 4397641 (E.E.O.C. July 16, 2015); *Complainant v. Cordray*, 2014 WL 7398828 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe*, 2014 WL 6853897 (E.E.O.C. Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, 2014 WL 5511315 (E.E.O.C. Oct. 23, 2014); *Complainant v. Johnson*, 2014 WL 4407457 (E.E.O.C. Aug. 20, 2014); *Couch v. Dep't of Energy*, 2013 WL 4499198 (E.E.O.C. Aug. 13, 2013); *Brooker v. U.S. Postal Serv.*, 2011 WL 3555288 (E.E.O.C. May 20, 2013); *Castello v. U.S. Postal Serv.*, 2011 WL 3560150 (E.E.O.C. Dec. 20, 2011); *Veretto v. U.S. Postal Serv.*, 2011 WL 2663401 (E.E.O.C. July 11, 2011).

[65] 81 FR 31472 § 92.209: "A covered entity shall not exclude from participation in, deny the benefits of, or otherwise discriminate against an individual or entity in its health programs or activities on the basis of the race, color, national origin, sex, age, or disability of an individual with whom the individual or entity is known or believed to have a relationship or association."

[66] *E.g.*, *Floyd v. Amite County School Dist.*, 581 F.3d 244, 249 (5th Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *McGinest v. GTE Service Corp.*, 360 F. 3d 1103, 1118 (9th Cir. 2004), cert. denied, 552 U.S. 1180 (2008); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks Inc.*, 173 F.3d 988, 993–96 (6th Cir. 1999); *Parr v. Woodmen of the World Life Ins.*, 791 F.2d 888, 892 (11th Cir. 1986). A number of District Courts have reached similar conclusions when the discrimination was based on association

have recognized that protections apply to both discrimination based on an individual's protected status and discrimination based on a disfavored association involving protected status. This provision is consistent with existing law and should be retained along with the protections concerning gender identity, sex stereotypes and sexual orientation.

The NPRM also argues that that discrimination "because of sex" under Title IX does not include gender identity or sexual orientation discrimination based on a lack of congressional activity in this area. The NPRM asserts that Congress's inaction indicates a policy preference to preclude interpretations of federal law that would protect LGBTQ people from discrimination. This argument is logically specious. First, as former Justice Scalia clarified in a unanimous 1998 Supreme Court decision, although same-sex sexual harassment was not the issue Congress was concerned with when it enacted Title VII, "statutory prohibitions often go beyond the principal evil [they were enacted to combat] … and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Thus, the *Oncale* case concludes, Title VII's ban on sex discrimination encompasses same-sex sexual harassment.[67] Accordingly, Congressional inaction is irrelevant to whether anti-LGBTQ bias is covered by statutory protections. There are many reasons why legislation does not advance in Congress.[68] But as Justice Scalia explained, it is the words of the statutes that have been enacted, as they are logically understood, that govern absent congressional action to change those words.[69]

The NPRM notes that the Supreme Court will soon be deciding analogous questions in the context of Title VII to help justify the proposed elimination of protections for LGBTQ people, but the proposed action is premature at best.[70] The Supreme Court might well hold, consistently with the enormous and growing case

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with persons of a different national origin or sex. *E.g.*, *Montes v. Cicero Pub. Sch. Dist. No. 99*, 141 F. Supp. 3d 885,900 (N.D. Ill. 2015) (national origin); *Morales v. NYS Dep't of Labor*, 865 F. Supp. 2d 220, 242-43 (N.D.N.Y. 2012), aff'd summarily, 530 F. App'x 13 (2d Cir. 2013) (race and national origin); *Kauffman v. Maxim Healthcare Servs., Inc.*, No. 04-CV-2869, 2006 U.S. Dist. LEXIS 47514, 2006 WL 1983196, at *4 (E.D.N.Y. July 13, 2006) (sex and race); *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1460 (D. Colo. 1985) (race and national origin). Courts have also recognized claims of associational discrimination under Section 504 of the Rehabilitation Act. *E.g.*, *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 277 (2d Cir. 2009); *Falls v. Prince George's Hosp. Ctr.*, No. Civ. A 97–1545, 1999 U.S. Dist. LEXIS 22551, 1999 WL 33485550 at * 11 (D. Md. Mar. 16, 1999).

[67] *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 79-90, 75 (1998). *See also* Brief of Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae in Support of the Employees, *Bostock v. Clayton County, Georgia*, Supreme Court No. 17-1618, and *Altitude Express, Inc. v. Zarda*, Supreme Court Case No. 17-1623, at page 31 (July 3, 2019), *available at* https://www.supremecourt.gov/DocketPDF/17/17-1618/107176/20190703170952032_190704%20for%20E-Filing.pdf.

[68] *See Solid Waste Agency of N. Cook Ct. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) ("However…another reasonable interpretation of that legislative non-history is that some Members of Congress believe that the *Ulane* court and others have interpreted "sex" in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation. As the Supreme Court has explained, [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (internal citations and quotation marks omitted)).

[69] *See further discussion in* Brief of Lambda Legal Defense and Education Fund, Inc., *Bostock v. Clayton County, Georgia*; *Altitude Express v. Zarda*, *supra*, note 67.

[70] 84 FR 27874.

law establishing that discrimination based on gender identity or sexual orientation both are prohibited forms of sex discrimination under Title VII.[71] Even if the Department is confident that the Supreme Court will agree with their contrary reasoning with regard to how sex should be understood under Title VII, many courts have disagreed, as discussed above. Therefore, unless and until the Supreme Court agrees with the Department's view, it clearly would be premature for the Department to act in a manner contrary to the overwhelming body of current case law. Accordingly, we urge the Department immediately to rescind this NPRM and to wait until the Supreme Court has issued a decision. If warranted at that time, the Department can open up another notice and comment period. But for now, if the Proposed Rule is permitted to remain extant, it will only invite harmful discrimination against LGBTQ people (and particularly transgender people), place health care providers in legal jeopardy by falsely signaling to them that it is fine to discriminate, and prompt litigation by those who are injured.

In one especially troubling section of the NPRM, the Department asserts that it considered adding gender identity and sexual orientation discrimination to a definition of sex discrimination or discrimination "on the basis of sex" under Title IX, but concluded doing so was inappropriate (again without any legal analysis) and that state and local entities are better equipped to address issues of gender "dysphoria" and sexual orientation.[72] The NPRM then obliquely refers to potential privacy interests involving "young children" and intimate settings. The notion that health care protections for LGBTQ people are at odds with "young children" in some way is deeply offensive and tellingly reveals the animosity the Department harbors towards LGBTQ people.

The NPRM follows this offensive reference with an equally offensive footnote about cases discussing restrooms and other facilities[73] that is untethered to existing law and outside the scope of Section 1557. The cases cited had nothing to do with what facilities should be available to a patient in a health care setting given the patient's gender identity.[74] In addition, the Department fails once more to acknowledge significant countervailing authority holding that there is no cognizable legal claim for having to share a restroom or

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[71] Given the Department's reliance on the Supreme Court's current consideration of TVII's scope of coverage with respect to anti-LGBT discrimination, and the fact that extensive briefing on this issue has been filed very recently with the Supreme Court, the Department's failure to acknowledge the extent of the case law contrary to its interpretation is even more unreasonable, arbitrary and capricious.

[72] 84 FR 27874.

[73] 84 Fed. Reg. 27846, 27874 n.179 ("Policies of covered entities that result in unwelcome exposure to, or by, persons of the opposite biological sex where either party may be in a state of undress – such as in changing rooms, shared living quarters, showers, or other shared intimate facilities – may trigger hostile environment concerns under Title IX. *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) ("Admitting women to [an all-male school] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements"); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) ("[M]ost people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning or humiliating.").)

[74] The quote from *U.S. v. Virginia* simply noted that Virginia Military Institute would likely need to make accommodations to transition from an all-male school; *Fortner v. Thomas* involved the asserted rights of (presumably cisgender) male inmates not to have their naked bodies and intimate bodily functions intrusively and regularly exposed to (presumably cisgender) female correctional officers.

other single-sex facility with a transgender person.[75] For the Department to suggest otherwise is inconsistent with the rule of law and can hardly be considered a "reasonable" analysis.

We are a nation of laws. Discrimination against transgender people in health care is not only wrong, court after court has held that it is unlawful under the Affordable Care Act. This lawless Proposed Rule invites harm to patients, will spur litigation after that harm is inflicted, and will place health care providers in serious legal jeopardy by falsely signaling to them that it is fine to discriminate against LGBTQ people. We urge the Department immediately to rescind the NPRM.

III. The NPRM Impermissibly Seeks to Eliminate Sexual orientation and Gender Identity Protections in Unrelated Regulations.

The NPRM proposes to allow states and Marketplaces to be able to discriminate against LGBTQ people in all aspects of the Affordable Care Act (nondiscrimination, eligibility determinations, enrollment periods and more). The NPRM purports to allow insurance companies to employ discriminatory benefit designs that could inquire about an applicant's sexual orientation or gender identity and use that information for determining insurability. The NPRM seeks to amend a series of unrelated rules to conform with the NPRM. In other words, the NPRM seeks not only to erase existing protections for LGBTQ people within the 2016 Final Rule, which is consistent with Section 1557 as enacted by Congress, they also seek to eliminate existing protections for LGBTQ people in other regulations—nine of them to be exact.[76] But these rules were not promulgated by OCR and these amendments fall outside OCR's jurisdiction. Rather, they were all advanced by CMS and were promulgated pursuant to the authority granted by several different statutes,[77] including Section 1321(a) and other provisions of the ACA, the Social Security Act and other statutory authority, not Section 1557. As such, OCR lacks the authority to repeal those regulations. It is evident from reliable media reporting that the Department intends to eliminate legal protections for and essentially erase transgender people from federal law, not solely from Section 1557's protections.[78] HHS lacks the authority to do so.

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[75] *E.g., Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 526-36 (3d Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1052-1053 (7th Cir. 2017); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018); *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018).

[76] Statutory authority for C.F.R. 155.120(c)(1)(ii), 45 CFR 155.220(j)(2)(requirements of ACA-created health insurance exclusions) provided under: 42 U.S.C. 18021-18024, 18031-18033, 18041-18042, 18051, 18054, 18071, and 18081-18083; statutory authority for 45 C.F.R. 147.104(e) (guaranteed availability of coverage): 42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92, as amended.; Statutory authority for 45 C.F.R.156.200(e) (QHP issuer participation standards): 42 U.S.C. 18021-18024, 18031-18032, 18041-18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701); Statutory authority for 42 C.F.R. 460.98(b)(3), 42 C.F.R. 460.112(a) (Programs of All-Inclusive Care for the Elderly): 42 U.S.C. 1302, 1395, 1395eee(f), and 1396u–4(f), 42 U.S.C. 1302, 1395, 1395eee(f), and 1396u–4(f). Part 460; Statutory authority for 42 C.F.R. 438.3(d)(4): 42 U.S.C. 1302; 42 C.F.R. 438.206(c)(2): 42 U.S.C. 1302; Statutory authority for 42 C.F.R. 440.262 (Standard Medicaid state plans and Medicaid contract requirements): Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

[77] The Affordable Care Act provided the statutory authority for CMS's promulgation of 45 C.F.R. 155.120(c)(1)(ii)(non-interference with Federal law and non-discrimination standards); 45 CFR 155.220(j)(2) (ability to States to permit agents and brokers to assist qualified individuals, qualified employers, or qualified employees enrolling in QHPs); and 45 CFR 156.200(e) (QHP issuer participation standards); 45 CFR 147.104(e) (guaranteed availability of coverage); 42 CFR 438.3(d)(4) (Standard contract requirements); 42 CFR 438.206(c)(2) (Availability of services); and 42 CFR 440.262 (Access and cultural considerations).

[78] Erica L. Green, Katie Benner and Robert Pear, *"Transgender' Could Be Defined Out of Existence Under the Trump Administration* (Oct. 21, 2018), *available at* https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html

One especially pernicious consequence of proposing to amend these other regulations is that it would allow discrimination against LGBTQ people with regard to marketing or benefit design practices of health issuers under the ACA.[79] Over 133 million people in the U.S. live with at least one chronic condition[80] and over 61 million live with a disability. Before the ACA, people with chronic health conditions were often denied care or paid exorbitant prices for substandard care. The protections against discriminatory benefit design has been lifesaving for many LGBTQ people. The NPRM's proposals, by contrast, would make it more difficult for LGBTQ people to afford health care, contrary to Congress's intentions when enacting the ACA.

For example, the 2016 Final Rule's prohibition on discriminatory plan benefit designs helped LGBTQ people living with HIV get the medications they need. Due to systemic barriers to health care, LGBTQ people have a "higher prevalence and earlier onset of disabilities" and disproportionately experience chronic conditions,[81] including HIV.[82] HIV disproportionately affects gay, bisexual, and queer men of color and transgender women of color.[83] For example, more than 25 percent of Black and Brown transgender women are living with HIV,[84] and 60 percent (10,070) of Black or African American individuals who received an HIV diagnosis in 2017 were gay or bisexual men.[85] Further, 26 percent of gay men, 36 percent of bisexual women, 36 percent of lesbian women, 40 percent of bisexual men experience a form of disability.[86] Additionally, 28 percent of transgender, nonbinary, and gender nonconforming people experience a form of disability.[87] The Proposed Rule unreasonably and unjustifiably would disproportionately impact LGBTQ people, especially LGBTQ people of color living with disabilities and chronic conditions.

The NPRM's proposal to "update" other unrelated regulations to carve out protections for LGBTQ people is not consistent with, and in some cases is unrelated to, the Affordable Care Act and the 2016 Final Rule. The Department has failed provide any explanation or analysis concerning why it proposes to change these unrelated rules or the impact of such an action. There is extensive information to be considered because

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("The department argued in its memo that key government agencies needed to adopt an explicit and uniform definition of gender as determined 'on a biological basis that is clear, grounded in science, objective and administrable.' The agency's proposed definition would define sex as either male or female, unchangeable, and determined by the genitals that a person is born with, according to a draft reviewed by The Times. Any dispute about one's sex would have to be clarified using genetic testing.").

[79] The NPRM proposes to update 45 C.F.R. 147.104(e) as a "conforming amendment" in order to eliminate protections for LGBTQ people.

[80] *The Growing Crisis of Chronic Disease in the United States,* Partnership to Fight Chronic Disease, (last visited Aug. 13, 2019), *available at* https://www.fightchronicdisease.org/sites/default/files/docs/GrowingCrisisofChronicDiseaseintheUSfactsheet_81009.pdf.

[81] Intersecting Injustice: A National Call to Action 63 (Lourdes Ashely Hunter, Ashe McGovern & Carla Sutherland eds., 2018), *available at* http://socialjusticesexuality.com/intersecting_injustice/.

[82] *Id.* at 48.

[83] *Id.* at 64-64.

[84] *Id.*

[85] *HIV and African Americans*, Ctrs. for Disease Control & Prevention, *available at* https://www.cdc.gov/hiv/group/racialethnic/africanamericans/index.html (last updated March 19, 2019).

[86] Disabled World, *LGBT and Disability: Information, News and Fact Sheets*, *available at* https://www.disabled-world.com/disability/sexuality/lgbt/ (last updated Feb. 7, 2019).

[87] S.E. James, et al., Nat'l Ctr. for Transgender Equality, *Report Of The 2015 U.S. Transgender Survey* 247 (2016), *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

some of these regulations have been in place for over a decade. Still, the Department fails even to purport to address the impact these regulations have had or the impact that changing these regulations would have.

Because these proposed changes are outside of the OCR's jurisdiction and are insufficiently related to Section 1557, and because the Department offers no legal, policy or cost-benefit analysis about them and their likely impacts on various CMS programs, it is not appropriate for these rulemakings to be combined.

IV. The NPRM's Inclusion of the Title IX Religious Exemption is Not Appropriate in the Health Care Context and Conflicts with the Statutory Text of the ACA.

The 2016 Final Rule provides that covered entities do not have to comply with Section 1557 if having to do so would violate religious exemption laws, but it does not include a categorical Title IX-based religious exemption. The Department rejected the request to include that exemption in the 2016 Final Rule because existing federal law already protects religious beliefs in an appropriate manner.

In addition, the Department explained that the Title IX exemption would be inappropriate in the health care setting because it is framed for educational institutions, which are vastly different from health care settings and the differences "warrant different approaches."[88] The Title IX exemption allows an *educational institution* controlled by a religious organization not to violate its own tenets.[89] Thus, an exemption such as allowing religious schools to only allow men to become ministers serves an important educational and religious function core to those institutions' purpose, which is very different from the purpose served by institutions and insurers that receive federal funding to provide health care to patients or plan members who are members of the general public.

The 2016 Final Rule explains that the education context also is different from the health care context because, for example, while students or parents select schools as matter of choice, individuals needing health care often have limited or no choice, especially patients who live in rural areas or where religious institutions have taken over hospitals that serve people of diverse faiths and no faith.[90] Religiously affiliated hospitals take up a large and growing portion of the health care market.[91] The 2016 Final Rule also clarifies that, unlike the dynamics in educational settings, a blanket religious exemption could result in denial or delay of care or the discouragement of care with serious "life threatening results." [92]

In addition, the inclusion of a new religious exemption, either explicitly or by reference, is contrary to the statutory language in Section 1557, which does not include any exceptions and which incorporated its

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[88] 81 FR 31379-80

[89] 20 U.S. C. § 1681(a)(3); 34 C.F.R. § 106.12 (emphasis added).

[90] *Id.* at 31380

[91] *See* Michael Hiltzik, *UC's deal with Catholic Hospitals Threatens the Health of Women and LGBTQ Patients*, LA TIMES (Apr. 12, 2019), *available at* https://www.latimes.com/business/hiltzik/la-fi-hiltzik-uc-dignity-health-discrimination-20190412-story.html; Amy Littlefield, *Meet Another Religious Health System Restricting Reproductive Care* (Jan. 30, 2019) REWIRE.NEWS, *available at* https://rewire.news/article/2019/01/30/meet-another-religious-health-system-restricting-reproductive-health-care/.

[92] 81 FR 31380.

enforcement mechanisms without any such additional exemption.[93] Inserting the Title IX exemption by regulation, contrary to the statute's text, also would create an imbalance in enforcement because the other enforcement statutes (Title VI, the Age Discrimination Act, and Section 504 of the Rehabilitation Act) do not have such exemptions.

Moreover, as Lambda Legal has explained in our prior comments, inserting a new, blanket Title IX religious exemption to Section 1557's protection against sex discrimination likely would have far reaching and serious consequences for patients. It would invite new instances in which health care providers, including insurance companies, hospitals, doctors and nurses, wrongfully would allow their personal beliefs to determine patient care, contrary to medical standards and the current nondiscrimination rules. Also as we previously have explained, religious exemptions disproportionately harm LGBTQ people, who too often are refused health care because of their sexual orientation or gender identity. For example, 8 percent of LGBQ people were refused health care because of their sexual orientation.[94] Similarly, 29% of transgender people were denied care because of their gender identity.[95] When LGBTQ people are denied care, it becomes difficult (and impossible for many) to find another provider, especially for those who live in rural areas and for transgender people. According to a 2018 study, 18% of LGBTQ people said it would be impossible to find the same type of service in another hospital.[96] These rates are dramatically higher for people living outside a metropolitan area, where 41% of respondents stated that, if they were denied treatment, it would be very difficult if not impossible to find the same service at a different location.[97]

For example, in 2017 Lambda Legal filed a federal lawsuit against St. Joseph's Healthcare in Paterson, New Jersey, after the hospital refused to allow a surgeon to perform a medically-necessary hysterectomy for Jionni Conforti as part of his medically necessary treatment for gender dysphoria.[98] In addition to New Jersey's Law Against Discrimination, the case includes a claim under Section 1557 because the Affordable Care Act prohibits discrimination against transgender people as a form of sex discrimination, and publicly funded hospitals must not be permitted to interpose religious beliefs between doctor and patient.

The Proposed Rule's misguided plan to create a new religious exemption ignores Congress's text and is likely to encourage health care providers and institutions to believe religious beliefs are a legitimate basis to limit or deny health care in ways that constitute illegal discrimination. The proposed plan would both harm patients and place health care providers at risk of significant liability. It should be withdrawn.

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[93] 42 U.S.C. 18116(a).

[94] Shabab Ahmed Mirza and Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, Center for American Progress (Jan. 18, 2018), *available at* https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See* Complaint for Declaratory, Compensatory, and Injunctive Relief, *Conforti v. St. Josephs Healthcare System, Inc.*, Case No. 17-cv-0050 (D.N.J. January 5, 2017), *available at* https://www.lambdalegal.org/sites/default/files/conforti_nj_20170105_complaint.pdf.

V. The NPRM Improperly Limits the Scope of Application of Section 1557.

It is unclear whether the NPRM seeks to narrow the scope Section 1557 to only programs or activities administered by the Department under Title I, but to the extent that the Department so intends, such an interpretation would be inconsistent with the Affordable Care Act's statutory provisions. Such a narrowing of scope would improperly carve out other HHS programs administered by other agencies.[99] Such a dramatic limiting of scope would be contrary to the statutory requirements of Section 1557, which applies broadly to "any health program or activity, any part of which is receiving federal financial assistance," any program or activity that is administered by an executive agency," and "any entity established under this title."[100] A narrowing of scope also cannot be squared with the court decisions that have found that state Medicaid plans, and other health insurance plans, violate Section 1557's sex discrimination when they exclude coverage of medical procedures for transgender persons.[101] Accordingly the current regulatory provisions regarding Section 1557's applicability to health insurance, and to HHS-administered programs outside the scope of ACA Title I, should be left in place. It is evident that the statutory text of Section 1557 extends to health programs or activities receiving federal financial assistance, including programs not funded directly by HHS, but which are administered by and executive agency.

The NPRM also seeks to improperly limit the scope of Section 1557 with regard to health insurance companies. The NPRM achieves this by redefining "health program or activity" to import a requirement that the health program or activity at issue be "principally engaged in the business of providing health care."[102] The Department's novel argument imports this interpretation from the Civil Rights Restoration Act ("CRRA") in order to allow insurance companies to discriminate without fear of liability under Section 1557 because they are not "principally engaged in the business of providing health care."[103] This legally incorrect.

Congress enacted Section 1557 more than two decades after the CRRA was enacted, and it did so with the clear intent to impose nondiscrimination requirements broadly to any "health programs and activities" receiving federal financial assistance.[104] If Congress intended to limit the scope of liability, it could have easily done so. However, it chose not to include this provision. Furthermore, the CRRA did not address the question of whether health insurance is a "health program or activity."

The proposed narrowing of the scope of Section 1557's protections would allow insurance companies that have to comply with Section 1557 for the plans they sell on an exchange to offer a discriminatory plan in other parts of the insurer's business, such as the sale of non-ACA products or when serving as a third party

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[99] *E.g.*, programs administered by the Center for Disease Control and Prevention, the Indian Health Service, and the Substance Abuse and Mental Health Services Administration.

[100] 42 U.S.C. § 18116(a).

[101] *E.g.*, *Flack v. Wisconsin Department of Health Services*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018) (holding that Medicaid exclusion targeting transgender people constitutes sex discrimination under Affordable Care Act and Equal Protection Clause).

[102] 84 92.3(a)(1), (b)-(c) ("[f]or purposes of this part, and entity principally or otherwise engaged in the business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing health care.")

[103] 84 FR 27850.

[104] 42 U.S.C. § 18116(a).

beneficiary for group health care plans. Non-ACA-compliant plans often discriminate against patients in various ways prohibited by Section 1557, and giving insurers license to discriminate in this way would defeat the text, context and purpose of Section 1557. The administration has sought to expand the availability of plans that lack consumer protections and the comprehensive design necessary to meet the needs of LGBQ people.[105] Many of these plans discriminate against transgender people and women by simply denying transition-related and reproductive care.[106] This aspect of the Proposed Rule thus is inconsistent with the ACA's text, congressional intent, and the statutory duty of HHS to act in furtherance of the health and well-being of all Americans.

VI. The ACA's Statutory Text Evinces a Clear Intent to Create a Single Legal Standard and Burden of Proof for Any Basis of Prohibited Discrimination Incorporated into Section 1557.

The NPRM repeals the enforcement mechanisms in the 2016 Final Rule and replaces them by limiting the enforcement mechanisms for each protected classification to those of the statute from which it was incorporated, namely those from Title VI, Title IX, the Age Discrimination Act, or Section 504 of the Rehabilitation Act respectively.[107] However, based on Congress's express mandate, Section 92.301 of the 2016 Final Rule clarified that *all* the mechanisms provided for by these statutes apply for purposes of Section 1557 enforcement. For one, Section 1557 creates a private right of action to address claims of discrimination on the basis of race, color, national origin, sex, age, or disability.[108] The ACA's statutory text makes evident that Congress did not intend to import multiple piecemeal legal standards from the multiple statutory contexts into a doctrinal crazy quilt, as the HHS now proposes in the NPRM.

Instead, Congress clearly intended to create a "singular standard, regardless of a plaintiff's protected class status."[109] First, "there is no indication that Congress limited the enforcement mechanisms to apply only to its own protected classes."[110] To the contrary, Congress specified that "[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 504, ***or*** such Age Discrimination Act shall apply for purposes of violations of this subsection."[111] The use of the disjunctive "or" clarifies that the enforcement mechanisms applicable under any of the incorporated statutes are available to every claim of

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[105] Jennifer Kates et al, *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.* (May 3, 2018) Kaiser Family Foundation, available at https://www.kff.org/report-section/health-and-access-to-care-and-coverage-lgbt-individuals-in-the-us-impact-of-changes-in-the-legal-and-policy-landscape-on-coverage-and-access-to-care/.

[106] *See* Karen Pollitz et al., *Understanding Short-Term Limited Duration Health Insurance, Kaiser Family Foundation* (Apr. 23, 2018), *available at* https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance/.

[107] *See* Section 27850 and 27891.

[108] *See Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 848 (D.S.C. 2015); *see also S.E. Pennsylvania Transp. Auth. V. Gilead Scis.*, Inc., 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *7 n.3 (D. Minn. Mar. 16, 2015); *East v. Blue Cross & Blue Shield of Louisiana,* No. 3:14-CV-00115-BAJ, 2014 WL 8332136, at 2 (M.D. La. Feb. 24, 2014).

[109] See *Rumble*, 2015 WL 1197415, at *10.

[110] *See* Sarah G. Steege, *Finding A Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 Mich. J. Race & L. 439, 462 (2011).

[111] 42 U.S.C. § 18116(a) (emphasis added).

discrimination under Section 1557.[112] This is so regardless of the particular type of discrimination triggering the claim. Applying standard rules of statutory construction, all the enforcement mechanisms provided for and available under each of the generally incorporated statutes in Section 1557 are available to every claim of discrimination under Section 1557.

The creation of a single legal standard and burden of proof is also manifest in Congress's interest in avoiding absurd results. Allowing different mechanisms and standards depending on whether the plaintiff's claim is based on race, sex, age or disability discrimination would lead to absurd inconsistencies and would provide "no guidance about what standard to apply for a Section 1557 plaintiff bringing an intersectional discrimination claim."[113] It would be absurd to interpret Section 1557 to not allow people to file complaints of multiple forms of discrimination in one place. Section 1557 recognizes the reality that discrimination "may occur not solely because of the person's race or not solely because of the person's sexual orientation or gender identity, [disability status, or national origin], but because of the combination."[114] Thus, the law aimed to make it easier for people to file complaints of intersectional discrimination. If adopted as a final rule, the proposed changes would only make it harder for people to file reasonably efficient complaints and seek redress in a sensible manner for the discrimination they experience, as Congress has intended.

In addition, we urge the Department to clarify that it has not invented a notice and deliberate indifference standard for claims brought under Section 1557 for purposes of institutional liability. Doing so is appropriate given the text of the statute, and will encourage health care institutions to create grievance procedures and to take steps to discover, address and eliminate discrimination. Requiring health care consumers to identify and notify the official within a health care institution with the requisite authority to address the alleged discrimination would place an unreasonable burden upon them, contrary to the special vulnerability of patients and the goals of Section 1557. Courts have rejected the imposition of an actual notice and deliberate indifference standard under Title IX in cases involving retaliation claims, equal opportunity in athletic programs, employment discrimination and in the athletic programs context.[115] Given Congress's purposes when enacting the ACA, the same result is proper here.

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[112] "In its elementary sense, the word 'or,' as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately." 73 Am. Jur. 2d Statutes § 147; *see also United States v. Woods*, 134 S. Ct. 557, 567 (2013) ("ordinary use [of the word 'or'] is almost always disjunctive"); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) (per curiam) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings and a statute written in the disjunctive is generally construed as setting out separate and distinct alternatives.") (internal citations and quotations omitted.

[113] *Rumble*, 2015 WL 1197415, at *11. "No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences." *United States v. Brown*, 333 U.S. 18, 27 (1948)."

[114] Brief for National LGBTQ Task Force as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop v. Col. C.R. Comm'n*, 137 S.Ct. 2290 (2017), http://www.thetaskforce.org/wp-content/uploads/2017/10/16-111-bsac-LGBTQ-Task-Force.pdf.

[115] See *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167 (2005) (Supreme Court holding that no pre-litigation notice required in the retaliation context); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) (athletic programs); *Roberts v. Colo. State Bd. Of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (courts have expressly held that Title VII, 42 U.S.C. § 2000e et seq., respondent superior standard is "the most appropriate analogue when defining Title IX's substantive standards" in the employment context).

VII. Notices of Nondiscrimination

Notices informing individuals that an entity cannot discriminate and what to do if they face discrimination, including how to file a complaint with OCR, are essential. The 2016 Final Rule requires covered entities with at least 15 employees to adopt a grievance procedure and designate at least one employee to coordinate its Section 1557 responsibilities.[116] The 2016 Final Rule also requires covered entities to provide notice of nondiscrimination policies in significant communications, in physical locations where the entity interacts with the public, and on the home page of their website. The notice of nondiscrimination must include information about the characteristics protected from discrimination under Section 1557, the availability of and how to access auxiliary aids and services, the availability of and how to access language assistance services, contact information for the designated employee coordinating the entity's Section 1557 responsibilities, the entity's grievance procedures, and complaint procedures for OCR. The Proposed Rule improperly attempts to eliminate these provisions entirely.

The NPRM also proposes to make it more difficult for people with Limited English Proficiency (LEP) to understand their health care rights under federal law by eliminating the requirements outlined in the final rule. As explained already, LGBTQ people experience significant health care disparities. These disparities are multiply compounded when a person is LEP, LGBTQ and a refugee or immigrant. Because of the persecution many LGBTQ people experience in their country of origin, many LGBTQ refugees and immigrants have had limited educational opportunities and often have limited English language facility, which in turn means additional, unwarranted barriers to appropriate health care.[117]

Because many individuals do not know about their rights, how to request language services, or how to file a complaint if they face discrimination, the 2016 Final Rule formulated standards to effectuate Congress's nondiscrimination intentions. By eliminating tagline requirements and notice standards, the Proposed Rule instead will undermine access to health care, health insurance, and legal redress for LGBTQ people and other vulnerable communities, contrary to the statute and without the analysis and evidentiary basis to support the proposed changes.

Moreover, without the regulatory requirements established in the 2016 Final Rule, patients are likely to be placed at risk for serious consequences with regard to privacy and confidentiality where access to language services in a confidential setting are essential in order for information about the patient's health status to be exchanged in a medically competent manner. The NPRM's proposed changes would make the requirement's scope significantly less clear and would cause confusion, discrimination and unjustified health consequences.

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[116] MaryBeth Musumeci et al., *HHS's Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), *available at* https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/.

[117] Sharita Gruberg et al, *Serving LGBTQ Immigrants and Building Welcoming Communities* (Jan. 24, 2018), Center for American Progress, *available at* https://www.americanprogress.org/issues/lgbt/reports/2018/01/24/445308/serving-lgbtq-immigrants-building-welcoming-communities/.

VIII. Private Right of Action

The NPRM asserts that the Department will "no longer assert that a private right of action exists for parties to sue covered entities for any and all alleged violations of the proposed rule … leaving the matter as primarily one for the courts to decide."[118] But this interpretation flouts the will of Congress. When Congress enacted the ACA, including Section 1557, it knowingly and intentionally incorporated the four statutes, each of which provides for both a private right of action as well as compensatory damages. In addition, Congress enacted Section 1557 "against the backdrop of" Supreme Court precedents and regulations making clear that each of the statutes incorporated into Section 1557 provided for a private right of action and compensatory damages.[119] Accordingly, it is beyond clear that Congress intended that there be a private right of action for Section 1557 claims.

IX. Risk Impact Assessment

OCR estimates that 60% (3% of the overall increase) of the originally anticipated increase of 5% of long-term caseload would have been attributable to discrimination claims based on gender identity and sex stereotyping.[120] OCR further estimates that the removal of gender identity and sex stereotyping protection will result in a certain number of covered entities currently at risk of incurring grievance–related costs will no longer face such costs. This analysis is completely unreasonable. First, there is no clarity with regard to the actual number of complaints that have been filed and this cited information thus is highly speculative. Second, because the erasure of gender identity and sex stereotyping protections from the rule is inconsistent with the vast consensus of case law precedent, it will significantly compound the number of grievances and lawsuits as the rule begins to encourage more discrimination and harassment, causing more and more individuals to bring grievances.[121] Lastly, the NPRM fails to account for the human costs associated with LGBTQ people who will be inappropriately denied, discouraged and discriminated against in some cases, with serious health care consequences.

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[118] 84 FR 27883-84.

[119] See *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996). See *Callum*, 137 F. Supp. 3d at 847 ("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."; *SEPTA*, 102 F. Supp. 3d at 698; *Rumble*, 2015 WL 1197415, at *7 n.3; see also *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (finding that although neither Section 202 of the ADA nor Section 504 of the Rehabilitation Act explicitly provides for a private cause of action, they implicitly create one due to their cross-references to each other ant to Title VI of the Civil Rights Act of 1964).

[120] 84 FR 27883.

[121] *See*, e.g., *Tovar v. Essentia Health*, cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018) (holding that a health care plan that excluded health services related to gender dysphoria discriminated against transgender people in violation of the Health Care Rights Law (Section 1557 of the Affordable Care Act), which prohibits discrimination in health care); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause); *Flack v. Wisconsin Department of Health Services*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018) (holding that Medicaid exclusion targeting transgender people constitutes sex discrimination under Affordable Care Act and Equal Protection Clause); *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act).

X. Conclusion

Although the NPRM cannot change the law, as interpreted by multiple courts already, it improperly signals to those who wish to discriminate that they are free to do so, promising direct harm to LGBTQ people, and especially transgender people. This lawless Proposed Rule will only spur both mistreatment of patients and resulting lawsuits, placing health care providers in legal jeopardy by falsely signaling to them that it is perfectly fine to discriminate contrary to established federal law. Similarly, all the Proposed Rule will do concerning insurers is to create confusion, foster discrimination against LGBTQ patients, and pointlessly expose insurers to costly lawsuits.

And yet one more serious impact the Proposed Rule will have if left extant for any substantial period – even if not finalized – is to discourage people from seeking the health care they need. Nearly half of the U.S. population already avoids medical appointments when they need them due to cost,[122] and many already avoid care because of fear of discrimination.[123] The combination of these factors, of course, falls hardest on those already marginalized, including people of color, people living with low incomes, and LGBTQ people.

For all the reasons stated above, HHS and CMS should not finalize the NPRM and should instead redirect their efforts to serving the explicit mission of the nation's health care agency by advancing health care access and equity for all. We urge the Department immediately to withdraw the NPRM.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Sasha Buchert at sbuchert@lambdalegal.org if further information would be of assistance.

Most respectfully,

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[122] Bruce Jaspen, *Poll: 44% of Americans Skip Doctor Visits Because of Cost*, Forbes (Mar. 26, 2018), *available at* https://www.forbes.com/sites/brucejapsen/2018/03/26/poll-44-of-americans-skip-doctor-visits-due-to-cost/#5feab6ff6f57.

[123] *See, e.g.,* S.E. James, et al., Nat'l Ctr. for Transgender Equality, Report Of The 2015 U.S. Transgender Survey 96-98 (2016), *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.