

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WHITMAN-WALKER CLINIC, INC., *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*,

Defendants.

Case No. 1:20-cv-1630

**DECLARATION OF DARREL CUMMINGS, CHIEF OF STAFF,
LOS ANGELES LGBT CENTER**

I, Darrel Cummings, hereby state as follows:

1. I am the Chief of Staff of the Los Angeles LGBT Center (“the Center”), a not-for-profit 501(c)(3) organization based in Los Angeles, California, that provides a variety of services to members of the lesbian, gay, bisexual, and transgender (“LGBT”) communities. I have served in this capacity since 2003, and also previously served as Chief of Staff from 1993 through 1999. More broadly, I have been an advocate on LGBTQ issues since 1979.

2. I am submitting this Declaration in support of Plaintiffs’ Motion for a Preliminary Injunction to prevent the revised regulation under Section 1557 of the Affordable Care Act, published by the Department of Health and Human Services on June 19, 2020 (the “Revised Rule”), from taking effect.

3. The Center was founded in 1969 and offers programs, services, and global advocacy that span four broad categories: health, social services and housing, culture and education, and leadership and advocacy. The mission of the Center is to fight bigotry and build a world where LGBTQ people thrive as healthy, equal, and complete members of society. Today the Center’s

more than 650 employees provide services for more LGBTQ people than any other organization in the world, with about 500,000 client visits per year.

4. As the largest provider of services to LGBTQ people in the world, many of the Center's patients tell us that they come to the Center seeking culturally competent health care due to being denied care or being discriminated against based on their real or perceived sexual orientation, gender identity, transgender status, and HIV status. The Center's client population is disproportionately low-income and experiences high rates of chronic physical and mental conditions, homelessness, unstable housing, trauma and discrimination, and stigmatization in health care services. Many of these clients come to the Center from different areas of California, other states, and even other nations to seek services in a safe and affirming environment.

5. Many of the Center's clients live in states that do not have explicit nondiscrimination protections in health care on the basis of gender identity, transgender status, or sexual orientation. These clients travel long distances to the Center because they have even greater fear of discrimination by health care providers in their states. With the Trump Administration's constant attacks on the LGBTQ community, the Center has seen and will continue to see an increase in clients traveling from out of state, especially clients who reside in rural areas where there may not be *any* LGBT-affirming health care providers to treat them in their most desperate times of need. This has been especially true during the current COVID-19 pandemic.

6. The Center provides a wide spectrum of health care services, including, but not limited to, HIV treatment, testing, and prevention care, as well as treatment for gender dysphoria and mental health care. The Center has medical providers who specialize in the care of transgender patients and who provide a full range of primary care services in addition to hormone therapy, pre- and post-surgical care, and trans-sensitive pap smears, pelvic exams, and prostate exams. The

Center's broad array of health care services are all under one roof, from counseling and therapy to pharmaceutical and nutrition needs.

7. The Center is one of the nation's largest and most experienced providers of LGBTQ health and mental health care. As a federally qualified health center, the Center is required to serve anyone on a nondiscriminatory basis who walks into its doors. We accept a variety of health insurance plans, including Medi-Cal (California's Medicaid program), Medicare, and most private insurance plans. We also provide services to uninsured individuals. We work with these individuals to help them access insurance through Covered California (California's Affordable Care Act "exchange"), and/or navigate other medical- and drug-assistance programs. Where insurance is not available, our services are offered on a sliding-scale basis, based on ability to pay. We pride ourselves on providing leading-edge health care, regardless of individuals' ability to pay. Given our commitment to serve all clients regardless of their ability to pay, the Revised Rule's removal of insurance coverage and nondiscrimination requirements will cause the Center to be flooded with more clients and create significant financial strains on the Center.

8. The Center has remained open for services throughout the COVID-19 health crisis, which already stretched the Center's resources thin. Releasing this discriminatory Revised Rule during a time of pandemic is particularly egregious. The Revised Rule will deter patients from seeking testing and treatment for COVID-19, which will endanger the lives our patients' lives and will cause serious harm to the public at large. Testing and contact tracing are key to effectively respond to this and other health pandemics. Yet, when patients fear discrimination, testing and contact tracing cannot be implemented effectively.

9. Amidst existing stress from the COVID-19 pandemic, our clients and staff have become increasingly panicked and stressed about the Revised Rule. As a result, the Center needs

to devote significant resources to reaffirming its commitment to the LGBTQ community, educating about the effects of the Revised Rule. The Center also needs to devote significant resources to addressing our clients' increased need for medical services and for affirming medical referrals given their fears of the discrimination by other health care providers that the Revised Rule invites. There is no more important time than now for our clients to know that we are open for services and they will continue to receive affirming, nondiscriminatory care at the Center. Our community needs to know that they have a safe and affirming place to receive care, especially emergency care. However, the Center cannot—despite our best efforts—meet effectively the needs of all the LGBTQ people that will be harmed by the Revised Rule, in California and other states.

10. The Center receives various forms of Health and Human Services funding, including Public Health Service Act funding. Approximately 80 percent of the Center's funding originates from the federal government, including, but not limited to, funding under the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, direct funding from the Centers for Disease Control and Prevention, discounts under the 340B Drug Discount Program, and Medicaid and Medicare reimbursements. The Center also receives federal funding for research programs, and is currently a participant in multiple federally-funded studies, including through National Heart, Lung, and Blood Institute; National Institute of Allergy and Infectious Diseases; National Institute of Child Health and Human Development; the National Institutes of Health; National Institute of Drug Abuse; and the Patient-Centered Outcomes Research Institute. The Center is, therefore, a covered entity under the Revised Rule and is subject to its provisions.

11. The Revised Rule eliminates the definition of "on the basis of sex" and the specific prohibitions on discrimination on the basis of gender identity, transgender status, and failure to

conform to sex stereotypes. The Revised Rule also eliminates specific provisions related to discrimination against transgender individuals, as well as the provision relating to the discrimination on the basis of association. The elimination of these provisions will result in direct harms to the LGBTQ patients that the Center serves.

12. The Revised Rule caused immediate panic from the Center's clients and staff about what the Revised Rule means and how it will affect the Center's clients' ability to obtain health care services. The Center's clients are and will continue to be confused and misled by the Revised Rule, which will further deter them from seeking care. The Center also refers its clients to other health care providers for many specialty health care services it does not provide. As a result of the Revised Rule, our clients who seek care by other health care providers outside of the Center, particularly those from other states but also those within California, will reasonably fear discrimination and be afraid to assert their rights if they are discriminated against. The Revised Rule creates confusion over what rights patients have and how patients may assert such rights. This is especially true given the Revised Rule's removal of a unitary legal standard that creates an additional barrier for clients to seek justice for the harms they experience, let alone finding a successful remedy for the harms.

13. In addition to the Revised Rule's elimination of the unitary standard, its removal of notice and tagline requirements will also make it much more difficult for transgender and gender nonconforming patients with Limited English Proficiency (LEP) to understand what rights they have, how to advocate for such rights, what language services are still available to them, how they can access such services and how to handle discrimination and other complaints. The Revised Rule appears to have been drafted to be purposefully sow chaos and confusion about what Section

1557 requires. That chaos and confusion is heightened for LEP patients who cannot reasonably be expected to understand what rights they still have if this discriminatory rule is implemented.

14. As a result of confusion and panic created by the Revised Rule, the Center has already and will continue to expend additional resources educating its clients and staff about their rights and reassuring them that the Center will continue providing nondiscriminatory services to all clients.

15. The Revised Rule will also worsen health disparities between the LGBTQ community and other communities. With existing health and health care disparities in the LGBTQ community – particularly the shortage of LGBTQ/HIV culturally competent providers – the Revised Rule’s invitation to health care providers to discriminate will further exacerbate existing barriers to health care and result in negative community health outcomes.

16. The Center’s providers have observed patients arriving at the Center with acute medical conditions that could have been avoided but-for the patients’ reluctance to seek routine and necessary medical care for fear of discrimination and being turned away. A shocking number of LGBTQ patients fear going to a health care provider due to negative past experiences directly related to their sexual orientation, gender identity, or transgender status. The Revised Rule will exacerbate those numbers as a result of increased discrimination and denials of health care treatment. For example, we have had clients arrive at the Center with Stage 4 ovarian cancer because they were afraid to seek routine pap smears. The Revised Rule creates additional barriers to accessing affirming health care, increases patients’ reluctance to seek care for both minor and serious conditions, and decreases trust between patients and their providers out of fear of judgment, discrimination, and denials of treatment. An increase in community members experiencing the

trauma of discriminatory or unwelcoming health care experiences will worsen community health outcomes among the population that the Center serves.

17. For similar reasons, LGBTQ people are less likely to have a primary care provider whom they consider their personal doctor. That means that in times of need, LGBTQ people are more likely to randomly select a health care provider with whom they do not have a relationship, and they are at increased risk of finding a provider who is not LGBTQ-affirming. With an increase in discrimination as a result of the Revised Rule, LGBTQ people will be far less likely to receive the health care treatment that they need because, after being discriminated against, they are unlikely to seek other care out of fear of repeated rejections.

18. The Revised Rule sends a message to the Center's LGBTQ clients that they do not have a right to equal access to health care and empowers health care providers to discriminate against them, which has caused and will continue to cause panic and fear within the Center's client community and staff. This fear will deter clients from seeking medically-necessary health care services out of fear of discrimination and will cause delays in treatment. This delay has serious medical ramifications for clients and public health at large. It also results in increased costs to the Center and the health care system at large.

19. Transgender and gender nonconforming clients are particularly likely to delay care as a result of the Revised Rule given the Rule's broad invitation to discriminate on the basis of any religious or moral beliefs in combination with the Rule's narrowing of insurance coverage options for transgender patients. The Revised Rule creates confusion over what treatments patients' insurance will cover and how they may access medically-necessary care. Discrimination by other outside health care providers will result in transgender patients delaying medical care, especially for medically-necessary treatment for gender dysphoria.

20. As a result of the discrimination and denials of care and coverage it will cause, the Revised Rule will increase demand for the Center's services and will cause financial strains on the Center. For some patients that the Center serves, especially those who live in regions with limited options for LGBTQ-affirming health care services, finding LGBTQ-inclusive health care options is already a struggle. Additionally, for some medical specialties, there are only a handful of health care providers in a patient's region who have the specialty necessary to treat the patient, so discrimination by even one provider could make it practically impossible for an LGBTQ patient to receive the specific health care service sought. This is even more concerning in regions where patients' only options are religiously-affiliated organizations that could claim religious or moral-based objections to providing any and all care to LGBTQ patients as a result of the Revised Rule, in contradiction to medical ethics and standards of care. This is especially true during the COVID-19 pandemic when medical services are more limited.

21. The Revised Rule eliminates explicit nondiscrimination regulatory protections and instead invites increased discrimination against LGBTQ people and people living with HIV at other health care centers, outside of the Center. By eliminating the explicit protections against discrimination based on gender identity, transgender status, and failure to conform with sex stereotypes, the Revised Rule invites an increase in discriminatory experiences for LGBTQ patients seeking health care services, such as those documented below. This results in harm to the patients and community that the Center serves.

22. The Center's health care providers – particularly its counselors, psychiatrists and other behavioral-health staff – have treated many patients who have experienced traumatic stigma and discrimination based on sexual orientation, gender identity, transgender status, HIV status, and/or

other factors. The stories that patients tell the Center's staff about their discriminatory experiences outside of the Center include:

- a. One transgender patient was unable to find supportive mental-health housing due to discriminatory experiences based on gender identity, which led to the patient being homeless.
- b. Another transgender patient, who developed profuse bleeding after surgery, was denied treatment at an emergency room where they were told by an emergency room doctor: "what do you want me to do about it?" They arrived at the Center in distress three days later, having lost a significant amount of blood.
- c. A transgender patient needed to have a pelvic exam. The Center referred him to a specialist who denied services to him because he was transgender.
- d. Patients have stated that their physicians told them that they do not need HIV testing because they are not engaging in same-sex sexual relationships. Not only is that conclusion contrary to medical guidelines, but when patients refuted assumptions about their sexual relationships, they were met with disapproval.
- e. Patients have expressed concern about traveling outside of Los Angeles for business because if they are ever in need of emergency medical assistance, they will not know where to go to ensure that they will receive nondiscriminatory, proper health care services.
- f. One patient recalled that when her late partner was in the hospital, she was there most of the time to care for her. There was a nurse who treated them

kindly and appropriately until the nurse heard them refer to each other by “Honey.” The look on the nurse’s face changed and she treated the couple “like trash” after that. The patient remarked that allowing health care employees (everyone from those working in food service and housekeeping to physicians and nurses) to express judgment or disapproval based on their religious or moral views when providing care to patients results in placing LGBTQ patients in a “lesser-than” category of patients.

- g. Patients residing at assisted-living facilities have described discrimination and denials of care when their sexual orientation, gender identity, and HIV status were revealed. Patients who are transgender have described having to hide their gender identity and transgender status once they are no longer able to care for themselves and are required to find assisted-living arrangements.
- h. Patients have described being intentionally referred to by names and pronouns other than their preferred names while seeking health care services elsewhere. There is no valid medical reason to not refer to a patient by their name and pronouns, consistent with their gender identity.
- i. A patient described being given his positive HIV results by way of his provider placing a lab printout on the counter then leaving for 10 minutes and letting the patient read it. The patient was not given any further information, and was instead told to go to our Center.
- j. Patients have reported that their primary care physicians do not feel comfortable prescribing HIV preventatives, such as Truvada for Pre-

Exposure Prophylaxis (PrEP), even when such medications are appropriate and should be provided according to current medical guidelines and standards of care. Patients also have reported that their physicians shame them for requesting PrEP medications and then deny them the medication, which is how they find their way to the Center. For example, when one patient asked his provider about Truvada, his physician questioned him as to why he needed it and proceeded to tell the patient that he would not need the medication if he were more careful. Another patient was denied PrEP altogether and lectured that he did not need PrEP unless he was having sex with sex workers.

- k. Patients also have expressed reluctance to use their insurance for PrEP because they are afraid of having the drug documented on their insurance record. These patients fear that a history of using a medically necessary HIV preventative could be used against them in the future by making them targets for discrimination based on sexual orientation, gender identity and/or transgender status, and HIV status, given the current political climate and discrimination in the health care context.
- l. A significant number of patients come to the Center's Sexual Health and Education Program for testing and sexual education rather than their primary care physicians because they do not feel comfortable talking about their sexual histories and choices out of fear of being treated negatively, judgmentally, and with bias and discrimination.

m. Multiple patients have stated that they come to the Center to be tested for sexually transmitted infections because the Center does rectal and throat swabs instead of only urine tests. Not all health care providers do all three forms of testing even though three-site testing provides the most accurate results for testing and treating sexually transmitted infections. This is especially true for gay men. Someone could test negative for a sexually transmitted infection with a urine test, for example, but test positive with a rectal swab. Patients report that when they specifically asked their outside provider to do rectal swabs, they were judged. When patients are judged by their physicians and/or cannot be out to their physicians about their sexual orientation and/or gender identity out of fear of discrimination, LGBTQ patients cannot receive the health care services that they need, including prophylactic treatments, and may experience delays in medically necessary treatments, resulting in more acute, life-threatening conditions.

23. Many of the Center's patients and LGBTQ people in general have reported that they are not out to their other medical providers about their sexual orientation and/or gender identity out of fear of discrimination and denial of health care. The Revised Rule's attempt to exclude sexual orientation, gender identity, and transgender status from the nondiscrimination protections under Section 1557 and its invitation to health care providers to discriminate on the basis of religious or moral beliefs will harm the Center's patients and puts the health of LGBTQ patients at risk.

24. The Revised Rule encourages LGBTQ patients to attempt to hide their LGBTQ identities when seeking health care services, especially from religiously-affiliated health care

organizations, in order to avoid discrimination. When patients are unwilling to disclose their sexual orientation and/or gender identity to health care providers out of fear of discrimination and being refused treatment, their mental and physical health is critically compromised.

25. The Revised Rule also adversely impacts the Center by necessitating the diversion and reallocation of resources to address the increase in the numbers of referrals requested by the Center's clients who seek LGBTQ-affirming services that the Center does not have sufficient resources to provide as a result of the Revised Rule. The Center will also have more difficulty finding LGBTQ-affirming health care providers, especially those with niche specialties, given that the Rule emboldens health care providers to refuse to treat LGBTQ patients.

26. As a result of the Revised Rule, the Center may need to hire additional staff to address the community's need for referrals to welcoming providers. A substantial part of the Center's staff and resources has already been spent engaging in advocacy, policy analysis, and services to address the ill-effects of the Revised Rule. The Center will also have to divert resources away from other programming to conduct informational sessions about the Revised Rule to answer patients' and staff members' questions about how the Rule will affect them and the services that the Center provides, as well as actually meet the increased demand for its services and the need to better vet referrals.

27. The increase in referral requests requires the Center to allocate additional staff time to pre-screen service referrals to ensure that staff are sending patients to LGBTQ-affirming providers and not to providers who themselves or whose staff would cause additional harm to the Center's patients. With the Revised Rule emboldening increased discrimination against LGBTQ patients, the Center will have to do additional checks on potential referrals to confirm with the providers that they will continue abiding by their obligation to provide nondiscriminatory care to all patients.

Additionally, the Rule's removal of accommodation requirements for LEP patients will make it increasingly difficult for the Center to find appropriate referrals for our LEP clients. Without requiring accommodations for our LEP clients, our clients are at an increased risk of receiving inferior care and improper testing and delayed diagnoses when they seek health care services from outside providers.

28. When a patient cannot communicate with and trust their health care provider, the provider has incomplete information to be able to properly diagnose, test and treat patients. This is especially true for patients who are unable to or fear disclosing their sexual orientation or gender identity to their providers out of fear of discrimination or denials of treatment. The Center will have to expend more resources on its health promotion campaigns to ensure that LGBTQ patients access necessary preventative screenings and testing (including for cancer, HIV and other STIs) given that the Revised Rule will change the health care landscape for the LGBTQ patient population.

29. Under the Revised Rule, covered entities will not be considered as discriminating on the basis of sex if they refuse to use a transgender patient's pronouns consistent with their gender identity; refuse them access to sex-specific facilities that are consistent with their gender identity and instead forces them into facilities/shared rooms based on the sex they were incorrectly assigned at birth; and identifies them by the sex they were incorrectly assigned at birth such as on patient identification bracelets and any signage outside the patient's room. These discriminatory actions, which as documented above, have been experienced by the Center's clients at other health care facilities, are inconsistent with the 2016 Final Rule and Section 1557 of the Affordable Care Act. They are also detrimental to transgender patients' health and wellbeing, and can lead to significant distress and hypertension. Moreover, HHS in the preamble to the Revised Rule warns

covered entities such as the Center that treating transgender patients consistent with their gender identity as it relates to sex-specific facilities may subject them to liability and enforcement by HHS. However, the Center treats each patient in accordance with their gender identity, consistent with the 2016 Final Rule and established case law. If the Center were to be sanctioned and lose federal funding as a result of the Revised Rule's enforcement, the impact would include massive service reduction if not closure.

30. The 2016 Final Rule protects against “categorical coverage exclusion[s] or limitation[s] for all health services related to gender transition” and denials, limitations, or restrictions “for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual,” 81 Fed. Reg. at 31,472 (formerly codified as 45 C.F.R. § 92.207(b)). Affirming providers like the Center and their patients have been able to use the 2016 Final Rule to reinforce the obligations of Medicaid administrators, insurers, and employee health plan sponsors to provide services to LGBTQ people devoid of discrimination, including the need to cover procedures when supported by evidence of medical necessity. The Revised Rule, which eliminates these protections that we at the Center rely upon to advocate on behalf of our patients, invites health plans to discriminate through the exclusion of gender-affirming procedures, especially those used to treat transgender patients suffering from gender dysphoria, and through the reinstatement of insurance practices regarding the “tiering” of certain drugs that are of crucial for LGBTQ patients living with HIV and/or other medical conditions or disabilities that require expensive treatments.

31. The Revised Rule also exempts numerous forms of health insurance from Section 1557, subjecting LGBTQ patients who rely on those forms of insurance to discrimination based on sex, gender identity, transgender status, sexual orientation, race, national origin, age, or

disability. Additionally, the Revised Rule excludes HHS health-related programs and activities from Section 1557, unless a program was established under Title I of the ACA. This affects many programs, including those under the Centers for Medicare and Medicaid Services. The narrowing of covered entities under Section 1557 will increase discrimination against LGBTQ patients while at the same time limiting remedies available to address such discrimination.

32. In sum, the Revised Rule will exacerbate the acute health disparities LGBTQ people already face and send the message that discrimination on the basis of gender identity, transgender status, sexual orientation, and failure to conform with sex stereotypes is permissible under federal law, which will increase the number of the Center's LGBTQ patients who will be denied care outside the Center.

33. The Revised Rule makes it difficult, if not impossible, for the Center to continue providing the same level of social, mental, and physical health care to its patients. The Center's mission includes addressing the need for equity in health care for all of the Center's patients and the LGBTQ community generally. This mission will be frustrated by the Revised Rule as there will be a decline in overall LGBTQ-patient health and public health at large. By eliminating the regulatory protections and clear guidance provided in the 2016 Final Rule, the Revised Rule presents a grave threat to the health and wellbeing of the patient population that we serve, most specifically LGBTQ patients and patients with LEP. The Revised Rule also frustrates our ability to provide referrals to our patients and imposes increased costs on the Center.

[Signature on next page.]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 6th day of July, 2020.

A handwritten signature in black ink, appearing to read 'D. Cummings', with a horizontal line extending to the right from the end of the signature.

Darrell Cummings