Lambda Legal
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March 6, 2023

VIA ELECTRONIC SUBMISSION

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience Rescission NPRM, RIN 0945-AA18
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Public Comment in Response to Conscience Rescission NPRM —RIN 0945-AA18

To Whom It May Concern:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") appreciates the opportunity provided by the Department of Health and Human Services ("HHS" or the "Department") to offer comments in response to the Proposed Rule, "Safeguarding the Rights of Conscience as Protected by Federal Statutes," RIN 0945-ZAA18 ("Proposed Rule" or "2023 NPRM"), published in the Federal Register on January 5, 2023,[1] which proposes rescission in large part of the Final Rule issued May 21, 2019, entitled "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" ("2019 Final Rule").[2] As described herein, the Proposed Rule appropriately rescinds portions of the 2019 Final Rule that were arbitrary and capricious, exceeded statutory authority, threatened patient health, and contravened the Department's mission, the legal rights of patients, the ethical obligations of health professionals, and the legal rights and responsibilities of institutional health care providers.

Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, policy advocacy, and public education. For decades, Lambda Legal has been a leader in the fight to ensure access to quality health care for vulnerable communities. Lambda Legal submitted comments to HHS on March 27, 2018, in response to the NPRM for the 2019 Final Rule, which explained the various ways in which the 2019 Final Rule was unlawful, unworkable, and would result in harm to patients.[3]

Lambda Legal also successfully challenged the 2019 Final Rule in court, resulting in a district court decision vacating it in its entirety. *County of Santa Clara et al. v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. March 9,

[1] 88 Fed. Reg. 820 (proposed Jan. 25, 2023) (codified at 45 C.F.R. pt. 88).
[2] 83 Fed. Reg. 3880 *et seq*. (proposed Jan. 26, 2018) (codified at 45 C.F.R. pt. 88).
[3] *Lambda Legal Comments on Proposed Rule re: Protecting Statutory Conscience Rights in Health Care*, RIN 0945-ZA03 (submitted March 27, 2018), available at https://www.lambdalegal.org/in-court/legal-docs/dc_20180327_comments-hhs.

2020). As the Department noted, this was one of three lawsuits that resulted in decisions vacating the 2109 Final Rule as defective in various respects. *See Washington v. Azar*, 426 F.Supp.3d 704 (E.D. Wash. 2019), *appeal docketed*, No. 20-35044 (9th Cir. March 9, 2020); *New York v. HHS*, 414 F.Supp.3d 475 (S.D.N.Y. 2019), *appeal docketed*, Nos. 19-4254 et al. (2d Cir. Dec. 18, 2019). Each of these courts made one or more of the following conclusions with respect to the 2019 Final Rule: (i) it exceeded the Department's authority; (ii) it was inconsistent in certain respects with the conscience statutes or other laws, including the Emergency Medical Treatment & Labor Act (EMTALA) and Title VII of the Civil Rights Act; (iii) it was arbitrary and capricious in its evaluation of the record, its treatment of the Department's conclusions underlying the 2011 Final Rule[4] and reliance interests of funding recipients, and its consideration of certain issues relating to access to care and medical ethics raised by commenters; (iv) it contained a definitional provision that was not promulgated in compliance with the notice-and-comment requirements of the Administrative Procedure Act; and (v) it contained penalties for non-compliance that violated the separation of powers and the Spending Clause. For the reasons described below, these courts got it right, and the 2023 NPRM appropriately rescinds in large part the 2019 Final Rule.

Over a period of decades, Congress has adopted context-specific statutes to address individuals and entities that do not wish to participate in certain medical procedures or research based on religious objections. These provisions exist against a backdrop of federal laws that protect access to medical treatment, ensure that patients can obtain the information necessary to give informed consent, and prohibit discrimination in the provision of healthcare services. Under the framework created by the 2011 Final Rule, hospitals and other healthcare organizations complied with these laws by crafting policies that accommodate religious objections while ensuring that patients receive care. The 2019 Final Rule upended these policies, threatened chaos, and put patients' health and even lives at risk by elevating religious objections over the obligation to provide care, even in emergency situations when patients need lifesaving care. Through various prohibitions and extremely broad definitions, the 2019 Final Rule invited discriminatory denials of healthcare specifically to women seeking reproductive healthcare and to LGBT people, especially transgender and gender-nonconforming patients seeking gender-affirming care. The 2019 Final Rule also was unworkable. It did not require any justification, notice, or referral be given to the patient who is denied care or to an employer who must navigate how to accommodate these refusals. It severely limited providers' ability to plan for denials of care based on employees' religious objections, and conflicted both with ethical requirements applicable to providers, and with existing federal laws prohibiting discrimination in healthcare and protecting access to care and information. Additionally, the 2019 Final Rule authorized the Department to impose draconian penalties for noncompliance, including by cutting off and clawing back all of a provider's federal funding. Because it was completely infeasible to implement, healthcare facilities faced pressure to do away with reproductive care and healthcare services for the LGBT community altogether, threatening to leave millions without access to critical care. The impact of the 2019 Final Rule would have been most severe on patients of color, low-income people, and people living with HIV, who already face barriers to care. In

[4] 76 Fed. Reg. 9968 (effective Mar. 25, 2011) (codified at 45 C.F.R. pt. 88).

summary, Lambda Legal supports the 2023 NPRM, consisting of rescission in large part of the 2019 Final Rule and a return to the framework created by the 2011 Final Rule.

I. The 2019 Final Rule Unlawfully Expanded Statutory Religious Exemptions.

The 2019 Final Rule improperly exceeded statutory authority, unlawfully expanding prerogatives of religious objectors at the expense of providers, physicians, and patients, by defining (or redefining) key statutory terms more broadly than the text of these statutes warranted or Congress intended and applying them across-the-board, rather than in the limited contexts Congress had specified. HHS's definitions of several statutory terms—specifically, "health care entity," "assist in the performance," "referral or refer for," and "discriminate or discrimination"— far exceeded the substantive bounds of their legislative origins.[5]

For example, the 2019 Final Rule reinterpreted what it means to "assist in the performance" of a procedure to include potentially any member of a regulated entity's workforce who objects to performing their job duties.[6] The 2019 Final Rule also included an aggressive expansion of the concept of "referral" from the common understanding of actively connecting a patient with an alternate source of a particular service to the provision of any information or directions that could possibly assist a patient who might be pursuing a form of care to which the employee objects.[7] This went far beyond a reasonable understanding of what the underlying statute justifies.

Similarly, where the statute authorizes "health care entities" to assert religious objections, the 2019 Final Rule grossly expanded the entities covered by that term to include health insurance plans, plan sponsors, and third-party administrators.[8] It also added a definition of "discrimination" that focused not on patients' interest in receiving equal, medically appropriate services, but rather on protecting health care providers' interests in continuing to receive favorable financial, licensing or other treatment while refusing on religious or moral objections to provide care despite medical standards, nondiscrimination rules, or other requirements.[9]

In numerous places, the 2019 Final Rule adopted interpretations extending the statutes reach beyond current understanding that the exemptions concern solely abortion and sterilization and follow the common medical understanding of those terms.[10] As one example, it repeatedly

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[5] See e.g., 45 C.F.R. § 88.2-88.3(a)-(c).
[6] Section 88.2, 83 Fed. Reg. at 3924.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Compare* cases describing statute's applicability to provision or refusal provide abortions or sterilization, *e.g., Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010), *and Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974), *with Geneva Coll. v. Sebelius*, 929 F.Supp. 2d402 (W.D. Pa. 2013), *on reconsideration in part* (May 8, 2013) (statute does not apply to provision of emergency contraception, which is not abortion or sterilization).

mischaracterized gender-affirming care for transgender patients as "sterilization,"[11] inviting religious and moral objections to such care, citing *Minton v. Dignity Health*.[12] *Minton* addressed whether a Catholic hospital was legally justified when it blocked a surgeon from performing a hysterectomy for a transgender man as part of the prescribed treatment for gender dysphoria. The hospital defended on religious freedom grounds, arguing that it was bound "to follow well-known rules laid down by the United States Conference of Catholic Bishops," including rules prohibiting "direct sterilization."[13]

But, to equate hysterectomy to treat gender dysphoria with direct sterilization is medically inaccurate. Sterilization procedures undertaken for the *purpose* of sterilization are fundamentally different from procedures undertaken for other medical purposes that incidentally affect reproductive functions. [14] Regardless of whether the United States Conference of Catholic Bishops considers gender transition-related care to be sterilization as a religious matter, the federal government's approval of a religious rationale as grounds for stretching a federal statute and permitting denial of medically-necessary care was problematic for both statutory interpretation and Establishment Clause reasons.

II. The 2019 Final Rule Failed To Acknowledge the Rights of Patients.

The 2019 Final Rule invited health workers and institutions to refuse to provide medical care for religious reasons, without acknowledging that patients often have countervailing rights. All federal agencies, including HHS, must comply with the federal statutes that protect LGBT people and others from discrimination, such as Section 1557 of the Affordable Care Act, which bars discrimination based on sex in federally funded health services and programs.[15] Properly understood, Section 1557 protects transgender patients from discriminatory denials of care based on their gender identity or transgender status.[16] It also protects lesbian, gay, and bisexual

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[11] 84 Fed. Reg. at 23,178, 23,205

[12] No. 17-558259 (Calif. Super. Ct. Apr. 19, 2017).

[13] Defendant Dignity Health's Reply Brief in Support of Demurrer to Verified Complaint, *Minton v. Dignity Health*, No. 17-558259, at 2 (Calif. Super. Ct. Apr. 19, 2017) (filed Aug. 8, 2017), https://www.aclusocal.org/sites/default/files/brf.sup_.080817_defendant_dignity_healths_reply_in_support_of_demurrer_to_verified_complaint.pdf.

[14] Supplemental Declaration of Randi C. Ettner, Ph.D. in Support of Plaintiffs' Motion for a Preliminary Injunction and Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, at 2-3, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019) ECF No. 130-4, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. March 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20191010_supplemental-declaration-randi-c-ettner.

[15] 42 U.S.C.A. § 18116.

[16] *See, e.g.*, *Kadel v. Folwell*, No. 1:19CV272, 2022 WL 3226731 at *29 (M.D.N.C. Aug. 10, 2022); *Fain v. Crouch*, No. CV 3:20-0740, 2022 WL 3051015, at *11 (S.D.W. Va. Aug. 2, 2022); *Kadel v. Folwell*, 446 F.Supp.3d 1, 14 (M.D.N.C. 2020); *Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. March 16, 2015). *See also Bostock v. Clayton Cnty,* 140

patients.[17] HHS lacks authority to reduce the protections provided to patients by separate statutes.

Moreover, the 2019 Final Rule also violated core constitutional guarantees: (1) the equal protection guarantee, which protects patients from being targeted by government for discriminatory denials of healthcare; (2) the Establishment Clause's protection against government favoring religion over non-religion, favoring certain religious beliefs over others, and elevating the religious wishes of some above the needs of others to be protected from harm, including the harms of discrimination; (3) the First Amendment's protections for speech and expression, including the right to disclose one's gender identity and sexual orientation in the context of seeking healthcare; and 4) limits on Congress's Spending Clause authority.

III. The 2019 Final Rule Failed To Acknowledge the Legal Rights, Duties, and Ethical Obligations of Health Care Providers.

The 2019 Final Rule created an unworkable process for accommodating religious and moral objections by specifying that accommodations must be voluntarily acceptable to the objecting employee, by prohibiting any inquiry into whether job applicants have religious objections to core duties, and by demanding that providers violate governing ethical standards for the practice of medicine. 45 C.F.R. § 88.2. First, the 2019 Final Rule failed to acknowledge that Title VII of the Civil Rights Act of 1964 limits the extent to which employers may be burdened by employee demands for religious accommodation.[18] Under Title VII, employers are not required to accommodate an employee's religion if doing so would constitute an undue hardship (e.g., "more than a de minimis cost" to the employer). 42 U.S.C. § 2000(e)(j); *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 225 (3d Cir. 2000) ("A sufficient religious accommodation need not be the 'most' reasonable one (in the employee's view), it need not be the one the employee suggests or prefers, and it need not be the one that least burdens the employee." (citing *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60 (1986))). Undue hardships to employers could include objections by coworkers to unfair additional job duties or to coworker proselytizing. Indeed, courts have confirmed that when denial of a requested accommodation is "reasonably necessary to the normal operation of the particular business or

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S.Ct. 1731 (2020) (analogous protection against sex discrimination in Title VII protects transgender workers).

[17] *Bostock*, 140 S.Ct. 1731 (Title VII's protection against sex discrimination constitutes protection against discrimination based on sexual orientation).

[18] 42 U.S.C.A. § 2000e *et seq. See*, *e.g., Bruff v. North Miss. Health Servs., Inc.,* 244 F.3d 495, 497-98 (5th Cir. 2001) (Title VII duty to accommodate employees' religious concerns did not require employer to accommodate employee's requests to be excused from counseling patients about non-marital relationships, which meant "she would not perform some aspects of the position itself"); *Berry v. Dep't of Social Servs.,* 447 F.3d 642 (9th Cir. 2006) (employer entitled to prohibit employee from discussing religion with clients).

enterprise,"[19] employers, including health care employers,[20] need only show that they "offered a reasonable accommodation *or* that a reasonable accommodation would be an undue burden."[21]Also, "an employer is not liable under Title VII when accommodating the employees' religious beliefs would require the employer to violate federal or state law," or if it would result in discrimination. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999); *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004). Such limitations on employee religious objections are essential to ensure that health care employers can hire those who will perform the essential functions of their jobs, and will comply with all statutory obligations including prohibitions against discrimination. However, the 2019 Final Rule conflicted with this authority by providing that an employer avoids potential liability only if the objecting employee "voluntarily accepts an effective accommodation,"[22] and was silent on what, if anything, an employer could do if an employee refuses to accept any accommodation at all.

The 2019 Final Rule also arbitrarily created a distinct hiring process for regulated entities with regard to religious objections, forbidding employers from inquiring in advance as to a prospective employee's objections, and imposing additional restrictions on an employer's ability to ask a current employee about conscience objections.[23] It placed employers in the impossible position of hiring people who may not perform the core duties of the position, or staffing current employees in positions that they no longer can perform after developing new objections in the course of employment, unbeknownst to the employer. Employers would be forced to hire duplicate staff simply to ensure patient needs are met by employees willing to perform basic job functions. Simply put, the 2019 Final Rule supplanted the statutory scheme established by Congress with an unworkable and impossibly costly mandate.

Moreover, the 2019 Final Rule ignored that health professionals are bound by ethical standards to do no harm and to put patient needs first. The Joint Commission's accreditation standards and the ethical rules of the American Medical Association and other leading medical associations all impose a duty of nondiscrimination in the treatment of patients with respect to gender identity, sexual orientation, and other irrelevant personal characteristics. For example, AMA Ethical Rule E-9.12 prohibits discrimination against patients and Ethical Rule E-10.05 provides that health professionals' rights of conscience must not be exercised in a discriminatory

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[19] 42 U.S.C.A. § 2000e-2(e).
[20] *See, e.g., Grant v. Fairview Hosp. & Healthcare Servs.,* No. Civ. 02-4232JNEJGL, 2004 WL 326694 (D. Minn. Feb. 18, 2004) (hospital wasn't required to accommodate employee's request to be able to proselytize or provide pastoral counseling to patients to try to persuade them not to have abortions)*; Robinson v. Children's Hosp. Boston*, Civil Action No. 14-10263-DJC, 2016 WL 1337255 (D. Mass. Apr. 5, 2016) (granting hospital employee's request to forgo flu shot would have been an undue hardship for hospital).
[21] See, e.g., *Sánchez-Rodríguez v. AT & T Mobility P. R., Inc*., 673 F.3d 1, 8 (1st Cir. 2012).
[22] Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23170, 23263 (Jul. 22, 2019).
[23] *Id*. at 23263.

manner.[24] But that is precisely what results when, for example, a medically necessarily hysterectomy is denied to a patient because it is needed as treatment for gender dysphoria, and is provided to other patients as treatment for fibroids, endometriosis, or cancer.[25]

The Tennessee Counseling Association has expressed the bottom line cogently. Like many medical associations across the country, the TCA has codified the "do no harm" mandate and issued a formal statement opposing legislation proposing to allow denials of medical care through religious exemptions in that state: "When we choose health care as a profession, we choose to treat all people who need help, not just the ones who have goals and values that mirror our own."[26]

IV. The 2019 Final Rule's Enforcement Mechanisms Were Draconian And Skewed Health Systems In Favor Of Religious Refusals And Against Patient Care.

The 2019 Final Rule's enforcement mechanisms included aggressive investigation, required medical facilities to subject themselves to an extensive scheme of regulatory surveillance by HHS, and allocated authority to OCR "to handle complaints, perform compliance reviews, investigate, and seek appropriate action."[27] In addition to conditioning federal funding on prospective pledges to comply with broad, vague requirements, penalties included not just the loss of future federal funding but even the potential of funding "claw backs,"[28] all with limited if any due process protections.

For many major medical providers, the threat of loss of federal funding is a threat to the facilities' very existence. The 2019 Final Rule would have forced medical facilities to the choice of foregoing their ethical obligations not to harm their patients or closing their doors. For those that could remain open, the result would be to skew health systems dangerously in favor of religious refusals and against patient care. Doing so would institutionalize discrimination and aggravate existing health disparities and barriers to health care faced by LGBT people and others, contrary to the mission of HHS and, in particular, its Office for Civil Rights.

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[24] AMA ethical rule E-9.12, "Patient-Physician Relationship: Respect for Law and Human Rights," E-10.05, "Potential Patients."

[25] *See also Conforti v. St. Joseph's Healthcare Sys.* No. 2:17-cv-00050 (D. N.J. filed Jan. 5, 2017); Amy Littlefield, *Catholic Hospital Denies Transgender Man a Hysterectomy on Religious Grounds*, Rewire.News, Aug. 31, 2016, https://rewire.news/article/2016/08/31/catholic-hospital-denies-transgender-man-hysterectomy-on-religious-grounds/.

[26] *See* Emma Green, *When Doctors Refuse to Treat LGBT Patients*, The Atlantic, April 19, 2016, https://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapists-mississippi-tennessee/478797/, citing Tenn. Counseling Assoc., *TCA Opposes HB 1840* (2016), https://web.archive.org/web/20170916080616/http://www.tncounselors.org/wp-content/uploads/2016/03/TCA-Opposes-HB-1840-3.9.16.pdf.

[27] 83 Fed. Reg. at 3898.

[28] *Id*.

V. The 2019 Final Rule Impeded Access to Information and Health Care Services, and Threatened Patient Health and Lives, and the Public Health.

The 2019 Final Rule invited individuals and entities to assert religious objections to a wide variety of care, including reproductive care, care for transgender patients, counseling for individuals in same-sex relationships and same-sex partners, and treatment for HIV/AIDS. It also would have resulted in patients being denied information critical to decisions about their care. Because it included no exceptions for emergencies, patients would be refused treatment even when seeking urgent and lifesaving care. The delay caused by a single health care worker's refusal to provide care in emergent circumstances, such as an ectopic pregnancy, may result in injury or death. If the 2019 Final Rule had taken effect, countless patients would have been harmed, either as a result of discriminatory denials of care, because they would delay or fail to seek medically necessary care for fear of experiencing such discrimination, because facilities working with underserved populations would close, or because of the public health consequences of deterring preventive treatment and treatment for active infections in an epidemic. Some would die.

Discrimination and related health disparities already are widespread problems for LGBT people and people living with HIV.[29] The plaintiff healthcare providers whom Lambda Legal represents in *County of Santa Clara et al. v. HHS* offered evidence in the form of sworn testimony concerning numerous discrete examples of discrimination against LGBTQ patients, patients seeking reproductive healthcare, and patients living with HIV. These plaintiffs include four private healthcare facilities across the country that provide reproductive-health services and healthcare services for LGBT people; four individual physicians and a licensed counselor who work for these entities; three national associations of medical professionals; and two organizations that provide a wide range of services to the LGBT community.[30] Many of the

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[29] *See, e.g.*, Inst. of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011) ("IOM Report") (undertaken at the request of the National Institutes of Health, and providing an overview of the public health research concerning health disparities for LGBT people and the adverse health consequences of anti-LGBT attitudes), https://www.ncbi.nlm.nih.gov/books/NBK64806; Caroline Medina & Lindsay Mahowald, Ctr. For Am. Progress, *Discrimination and Barriers to Well-Being: the State of the LGBTQI+ Community in 2022* (Jan. 12, 2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/; Sandy E. James et al., Nat'l Ctr. For Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 93-129 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf; Shabab Ahmed Mirza & Caitlin Rooney, Ctr. For Am. Progress, *Discrimination Prevents LGBTQ People from Accessing Health Care* (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care.

[30] Lambda Legal, together with co-counsel Mayer Brown, Americans United for Separation of Church and State, and the Center for Reproductive Rights, represent the private entities, associations, organizations, and individual plaintiffs. Mayer Brown represented all plaintiffs, including the County of Santa Clara.

examples they described involved healthcare workers who cited religious objections as their justification for refusing to treat such patients. Their testimony included the following:

- In 2009, a transgender woman who needed extensive surgery to repair diffuse damage caused by silicone injections into her breasts years earlier was turned away from an academic plastic surgery center in Los Angeles. She suffered from life-threatening systemic metabolic complications from the chronic inflammation and skin breakdown caused by the hardened subcutaneous silicone injections. The surgeon said her problem was caused by her own poor decision-making and she therefore would not be considered for treatment. Her general medical condition gradually deteriorated over the several years it took for her medical providers to identify a different surgeon who would take her case. Although she eventually was able to locate a surgeon who performed a procedure successfully, the abuse to which she was subjected by the academic center's specialists caused her to be unwilling to consider seeing another surgeon for the next six-and-a-half years, with associated avoidable suffering.[31]

- A transgender patient who had traveled abroad for surgery began bleeding profusely from her vagina a week after the procedure. When she went to an emergency room in Los Angeles, a physician looked disgusted and said "What do you want me to do about it?" and then walked away. She had to pack her own vagina with gauze pads and leave the emergency room, not knowing if she would live or die. She survived after seeking treatment from the Los Angeles LGBT Center ("LA LGBT Center"), a healthcare facility that specializes in the treatment of LGBT patients, three days later after having lost a significant amount of blood.[32]

- A transgender patient went to a urologist due to uncomfortable urination lasting for several years after her vaginal surgery. Medical staff, including a doctor,

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[31] Declaration of Dr. Robert Bolan, Chief Medical Officer, Los Angeles LGBT Center, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 2, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-3,*consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed* , Nos. 20-15398 et al. (9th Cir. March 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-robert-bolan.

[32] Declaration of Dr. Ward Carpenter, Co-Director of Health Services, Los Angeles LGBT Center, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 3, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-6, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. March 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-ward-carpenter.

repeatedly referred to her as "sir" and "he," despite repeated requests to use the correct pronouns, and flatly refused to refer to her as a woman. Additionally, the doctor did not close the door to the exam room during their visit, so that the entire waiting room could hear his conversations with her, and asked her to remove her pants in full view of the waiting room. She was so traumatized by this experience that four years later she continued to live with daily pain rather than risk being subjected to discrimination by another urologist.[33]

- A patient living with HIV was referred by a physician at the LA LGBT Center to a surgeon at another facility for a routine procedure. The patient was refused care because of his HIV status, and waited another two months to have this surgery, which could have caused severe or life-threatening complications.[34]

- A gay male patient with a serious and concerning neurological condition went to a neurologist. At this visit, the doctor had religious brochures throughout the waiting room. On arrival in the exam room, he was given a brochure about a particular Christian faith and asked if he had any questions. The patient felt extremely uncomfortable. As a result, he did not return for care and experienced a delay of several more months trying to find a new doctor he could trust.[35]

- A transgender patient of physicians at the LA LGBT Center was unable to find supportive mental-health housing due to discriminatory experiences based on gender identity, which led to the patient becoming homeless. Patients residing at assisted-living facilities similarly have described discrimination and denials of care when their sexual orientation, gender identities, and HIV statuses were revealed. Patients who are transgender have described having to hide their gender identities and transgender status once they are no longer able to care for themselves and are required to find assisted-living arrangements.[36]

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[33] *Id* at 2-3.

[34] *Id.* at 4.

[35] *Id.* at 3.

[36] Declaration of Darrel Cummings, Chief of Staff, Los Angeles LGBT Center, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 5, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-8, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. March 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-darrel-cummings.

- A physician at the LA LGBT Center determined that a transgender patient required a pelvic exam and referred him to a specialist, who denied services to him because he was transgender.[37]

- A patient of the LA LGBT Center described a discriminatory experience with a nurse in another healthcare facility while caring for her late partner in the hospital because they were in a same-sex relationship.[38]

- Multiple patients at the LA LGBT Center have reported that their primary care physicians at other facilities do not prescribe HIV preventatives, such as Truvada for 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 shamed them for requesting PrEP medications and then denied them the medication, which is how they found their way to the Center. Multiple patients also reported discriminatory experiences based on their sexual orientation and gender identity when seeking testing elsewhere via rectal and/or throat swabs for sexually transmitted infections. Such experiences not only cause individual patients to delay medically necessary screenings and treatments for fear of discrimination, resulting in more acute, life-threatening conditions, but also threaten public health.[39]

- After a gay male patient of physicians at Whitman-Walker Health ("WWH") consulted a cardiologist at another facility for a heart concern, the cardiologist reviewed his medications and saw that one was Truvada, an antiretroviral medication taken by persons who are not HIV-infected to avoid contracting HIV during sex. The cardiologist expressed disapproval and shamed the patient for his sexuality.[40]

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[37] *Id.*

[38] *Id*.

[39] *Id.* at 6.

[40] Declaration of Dr. Sarah Henn, Chief Health Officer, Whitman-Walker Health, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 4, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-11, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. Mar. 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-sarah-henn

- A transgender man informed his treating physicians at WWH that when he consulted a fertility clinic, together with his girlfriend, about their pregnancy options, clinic staff told them that they would not help people like them.[41]

- A transgender patient of WWH tried to fill a prescription at a non-WWH pharmacy for a hormone prescribed as treatment for gender dysphoria, and was refused by the pharmacist.[42]

- Multiple patients of WWH seeking to fill prescriptions for Truvada also have been refused by certain pharmacies.[43]

- A gay male patient of WWH reported that he was treated with contempt by staff at a local emergency room and lectured about his sex life after he went to a local hospital emergency room after an accident that occurred during sex.[44]

- A transgender patient of WWH went to a local hospital emergency room suffering from acute abdominal pain. The patient was subjected to intrusive, hostile questioning by emergency room personnel, loudly and in public, about their anatomy and gender identity.[45]

- A physician at WWH, while in residency at a hospital in a major Midwestern city, personally observed other residents refuse to refer to transgender patients by pronouns conforming to their gender identity, citing their religious beliefs. They continued to refuse even when informed that they were violating hospital policy.[46]

- A transgender patient of physicians at WWH was scheduled at another facility to receive an ultrasound for cancer. The first radiological technician she encountered refused to perform the ultrasound. When she protested, a second technician performed the procedure, but mocked her openly.[47]

- Transgender patients have reported to physicians at WWH that they have been in medical or mental-health crisis and called for an ambulance, and that the Emergency Medical Service personnel who have arrived on the scene have intentionally used pronouns inconsistent with their gender identity, even when the

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[41] *Id* at 5.
[42] Id.
[43] Id.
[44] Id.
[45] Id.
[46] Id.
[47] Id.

patients have asked them to stop and told them that their language was increasing their distress.[48]

- Local hospitals and surgeons have refused to perform gender-affirming surgeries on multiple transgender patients of WWH physicians, even when these hospitals and surgeons routinely perform the same procedures on non-transgender patients, including in situations where the patient's insurance would cover the procedure or when the patient was able to pay for the procedure. This has happened with orchiectomies, breast augmentations, and breast reductions—procedures that all are routinely performed for treatment of cancer or for other reasons unrelated to gender identity.[49]

- WWH physicians report that multiple primary care physicians in the Washington, D.C. area have refused to prescribe hormone therapy for transgender patients seeking treatment for gender dysphoria. Multiple doctors refusing such treatment have stated that they are not "comfortable" with such hormone therapy.[50]

- WWH providers have encountered multiple instances in which a transgender or gender non-conforming teenager who presented at a local hospital with symptoms for which hospitalization was indicated experienced delays in their hospitalization or even outright denial of hospitalization because hospital personnel failed to treat their conditions as seriously as they would treat other young people with similar presentations who were not transgender.[51]

- A patient of WWH was denied an opioid antagonist, Narcan, in a crisis overdose situation because the Emergency Medical Services personnel available expressed disapproval of the patient. WWH staff witnessed this interaction outside of WWH's own clinic, and were forced to use WWH's own clinic stock of the medication to reverse a life threatening overdose.[52]

- A transgender teenage patient of physicians at WWH was hospitalized after a suicide attempt. Hospital staff refused to address the teen with the correct pronouns and gender throughout the teenager's hospital stay, exacerbating the teen's acutely fragile state.[53]

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[48] *Id* at 6.
[49] Id.
[50] *Id* at 7.
[51] Id.
[52] *Id* at 8.
[53] Declaration of Dr. Randy Pumphrey, Senior Director of Behavioral Health, Whitman-Walker Health, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 3, *County of Santa Clara v. HHS*, No. 5:19-cv-2916, (N.D. Cal. 2019), ECF No. 36-18, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-

- WWH physicians have learned from their patients that a local facility that specializes in in-patient mental health and substance-use disorder treatment, and which has explicit non-discrimination policies, nonetheless has significant trouble from nurses on weekend shifts (when the facility uses pool nurses rather than regular employees), who express strong disapproval of LGBT patients based on the nurses' religious beliefs or cultural upbringing. LGBT patients encounter hostility, expressions of disapproval, and lack of responsiveness to their needs or requests from these nurses. For patients hospitalized for mental or substance-use disorders, these experiences can activate their disorders.[54]

- A Muslim lesbian behavioral health patient of WWH was hospitalized for suicidal ideation at a local in-patient facility as a result of depression and anxiety from post-traumatic stress disorder. While processing her discharge, a nurse at the facility, who identified herself as Christian, stated that she believed that 911 was a blessing since it woke up Christians about how bad Muslims are. The patient reported feeling exposed and vulnerable and told the nurse that not only was she Muslim, but she herself had been the victim of terrorism. The encounter with the nurse exacerbated the patient's depression and anxiety.[55]

- A transgender patient of WWH who was about to have surgery at a Washington, D.C. hospital for an inner ear condition (unrelated in any way to the fact that she is transgender) was confronted and harassed by hospital staff objecting to her gender identity. She was repeatedly and intentionally referred to as "he" and as "a man" by staff in the radiology department when she went for a pre-surgical scan; by desk staff at the surgery center; and by the nurse preparing her for surgery. Several nurses talked about her with each other and laughed. One staff person refused to talk with the patient when she addressed them. Even the anesthesiologist whom she was expected to entrust with her life in one of her most vulnerable moments before surgery, mocked her and intentionally referred to her as a man. The staff increased her fear just before her surgery by showing disrespect and lack of care for the patient's health and well-being.[56]

- Another transgender patient of WWH went to the office of an ophthalmologist at another facility for an eye exam, and was denied care. Staff members called a

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15398 et al. (9th Cir. Mar. 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-randy-pumphrey.

[54] *Id* at 4.

[55] *Id* at 3-4.

[56] Declaration of Dr. Naseema Shafi, Chief Executive Officer, Whitman-Walker Health, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 8-9, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-19, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. Mar. 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-naseema-shafi.

security guard to eject her from the office. As the patient spoke to the security guard, one of the clinic staff told her loudly, "Sir, your kind needs to go away. We're not serving your kind."[57]

- A transgender woman was seen by a medical provider at WWH, who examined her and determined she might have broken her ankle. She was sent to the Emergency Room at a Washington, D.C. hospital. She identified herself to the Emergency Room check-in staff as a woman and presented a driver's license that contained a female gender marker. She then waited for a number of hours (she remembers five or six) without being examined. When she inquired about the delay, she was treated rudely and misgendered by Emergency Room staff. She was finally called from the waiting area, but was taken to the men's dressing room, rather than the area for female patients, to undress and put on a gown for a scan. During the four or more hours before she received the scan, examination and treatment, she suffered very significant physical pain.[58]

- An LGBT patient of WWH physicians who had end-stage renal disease was confronted by a staff person at the dialysis clinic the patient attends regularly for care. The employee expressed a strong dislike for LGBT people and objected to being involved in the patient's care at the clinic.[59]

- A transgender recipient of services from Bradbury-Sullivan LGBT Community Center in Pennsylvania reported that her doctor made negative, religious-based comments to her and as a result she avoided medical care for three years. After she finally returned for a physical examination, the doctor refused to touch her.[60]

- Staff at the Center on Halsted in Chicago have learned from their clients that these clients' requests for prescriptions such as PrEP were rejected by healthcare providers outside of Center on Halsted, who told these patients that providing such treatment was contrary to their moral beliefs and would promote "promiscuous" lifestyles and "gay sex."[61]

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[57] Id.
[58] Id.
[59] Id.
[60] Declaration of Adrian Shanker, Founder and Executive Director of Bradbury-Sullivan LGBT Community Center, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 3, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-20, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. Mar. 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-adrian-shanker.
[61] Declaration of Modesto Tico Valle, Founder and Executive Director of Bradbury-Sullivan LGBT Community Center, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 7, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (dated Jun. 6, 2019), ECF No. 36-24,

- A healthcare professional who is a member of GLMA: Healthcare Professionals Advancing LGBTQ Equality, described the prevalence of discrimination in healthcare in the following way: "I see patients nearly every day who have been treated poorly by providers with moral and religious objection. Patients with HIV who have been told that they somehow deserved this for not adhering to God's law. Patients who are transgender who have been told that 'we don't treat your kind here'. The psychological and physical damage is pervasive."[62]

- Another healthcare professional reported the following: "[Some providers in my clinic] do not wish to have contact with transgender patients, mumbling religious incompatibilities when asked why. These people have made our transgender patients feel very uncomfortable and unwelcome at times, making them potentially more hesitant to use the health services they may need."[63]

- Another physician described the impact of discriminatory denials of healthcare on patients: "The impact on my patients who were directly denied care was both psychological and physical. With regard to their mental wellbeing they clearly felt marginalized and disrespected. With regard to their physical wellbeing, they experienced delay in care, and in some cases disruption of their routine medication dosing or diagnostic assessment."[64]

This testimony is consistent with overwhelming evidence from other sources, including Lambda Legal's 2010 survey, *When Health Care Isn't Caring: Survey on Discrimination Against LGBT People and People Living with HIV*.[65] Of the nearly 5,000 respondents, more than half reported that they had experienced at least one of the following types of discrimination in care:

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consolidated with City & Cnty. of San Francisco et al. v. Azar, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. Mar. 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-modesto-valle.

[62] Declaration of Hector Vargas, Executive Director of GLMA: Healthcare Professionals Advancing LGBTQ Equality, in Support of Plaintiffs' Motion for a Preliminary Injunction, at 6, *County of Santa Clara v. HHS*, No. 5:19-cv-2916 (N.D. Cal. 2019), ECF No. 36-25, *consolidated with City & Cnty. of San Francisco et al. v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019), *appeal docketed*, Nos. 20-15398 et al. (9th Cir. Mar. 9, 2020), available at https://www.lambdalegal.org/in-court/legal-docs/county_ca_20190611_declaration-hector-vargas.

[63] Id.

[64] Id.

[65] Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* (2010) ("Lambda Legal, Health Care"), http://www.lambdalegal.org/publications/when-health-care-isnt-caring.

- Health care providers refusing to touch them or using excessive precautions;
- Health care providers using harsh or abusive language;
- Health care providers being physically rough or abusive;
- Health care providers blaming them for their health status.[66]

Almost 56 percent of lesbian, gay, or bisexual (LGB) respondents had at least one of these experiences; 70 percent of transgender and gender-nonconforming respondents had one or more of these experiences; and almost 63 percent of respondents living with HIV experienced one or more of these types of discrimination in health care.[67] Almost 8 percent of LGB respondents reported having been denied needed care because of their sexual orientation,[68] and 19 percent of respondents living with HIV reported being denied care because of their HIV status.[69] The picture was even more disturbing for transgender and gender-nonconforming respondents, who reported the highest rates of being refused care (nearly 27 percent), being subjected to harsh language (nearly 21 percent), and even being abused physically (nearly 8 percent).[70]

Respondents of color and low-income respondents reported much higher rates of hostile treatment and denials of care. Nearly half of low-income respondents living with HIV reported that medical personnel refused to touch them, while the overall rate among those with HIV was nearly 36 percent.[71] And while transgender respondents as a whole reported a care-refusal rate of almost 27 percent, low-income transgender respondents reported a rate of nearly 33 percent.[72] People of color living with HIV and LGB people of color were at least twice as likely as whites to report experiencing physically rough or abusive treatment by medical professionals.[73]

Also detailed in the report are particular types of discrimination in health care based on gender identity, sex discrimination against LGB people, and discrimination against people living with HIV. Such discrimination can take many forms, from verbal abuse and humiliation to refusals of care;[74] to refusal to recognize same-sex family relationships in health care settings to the point of keeping LGBT people from going to the bedsides of their dying partners;[75] to lack of understanding and respect for LGBT people.[76] The resulting harms are manifold, from

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[66] *Id*. at 5, 9-10.
[67] *Id*.
[68] *Id*. at 5, 10.
[69] *Id*.
[70] *Id*. at 10-11.
[71] *Id*. at 11.
[72] *Id*.
[73] *Id*. at 12.
[74] *Id*. at 5-6.
[75] *Id*. at 15-16.
[76] *Id*. at 12-13.

transgender patients denied care postponing, delaying, or being afraid to seek medical treatment, sometimes with severe health consequences, or resorting out of desperation to harmful self-treatment;[77] to the mental and physical harms of stigma;[78] to other immediate physical harms from being denied medical care.

As described, the discriminatory treatment of LGBT people too often occurs in the name of religion. When it does, that religious reinforcement of anti-LGBT bias often increases the mental health impacts of discrimination.[79]

Since the 2010 Lambda Legal survey, other studies have similarly documented the disparities faced by LGBT people seeking health care. For example, *The Report of the 2015 U.S. Transgender Survey*, a survey of nearly 28,000 transgender adults nationwide, found that 33 percent "of respondents who had seen a health care provider in the past year reported having at least one negative experience related to being transgender, such as verbal harassment, refusal of treatment, or having to teach the health care provider about transgender people to receive appropriate care" and that "23% of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person[.]"[80]

The Center for American Progress in 2022, in conjunction with the independent and nonpartisan research group NORC at the University of Chicago, conducted another nationally representative survey with similar results about LGBT health disparities, including findings that:

- More than 1 in 5 LGBTQI+ adults reported postponing or avoiding medical care in the past year due to disrespect or discrimination by medical providers, including more than 1 in 3 transgender or nonbinary people surveyed.

- Approximately 1 in 3 LGBTQI+ adults reported encountering at least one kind of negative experience or form of mistreatment when interacting with a mental health professional in the past year, including 2 of 5 LGBTQI+ people of color, and more than 1 in 2 transgender or nonbinary people surveyed.

- Nearly 1 in 3 transgender or nonbinary respondents, including more than 2 in 5 transgender or nonbinary respondents of color, reported

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[77] *Id.* at 6, 8, 12-13.
[78] *Id*. at 2.
[79] Ilan H. Meyer et al., *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, 43 Suicide & Life Threatening Behavior 25, 33 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4871112/("[A]lthough religion and spirituality can be helpful to LGB people, negative attitudes toward homosexuality in religious settings can lead to adverse health effects") (internal citations omitted).
[80] James et al., *supra* n. 27, at 93.

> encountering some kind of health care refusal by a doctor or other health care provider in the past year. [81]

Independently of our own and others' research studies, Lambda Legal has become distressingly aware of the nature and scope of the discrimination problem from our legal work and requests for assistance received by our Legal Help Desk. We have repeatedly submitted information about the pattern of religion-based refusals of medical care to LGBT people in response to HHS requests. For example, in our 2013 response to the Request For Information for Section 1557 of the ACA,[82] we documented numerous cases in which health professionals had denied medical care or otherwise discriminated against LGBT people and/or people living with HIV, based on the professionals' personal religious views, including:

- Guadalupe "Lupita" Benitez was referred for infertility care to North Coast Women's Care Medical Group, a for-profit clinic that had an exclusive contract with Benitez's insurance plan. After eleven months of preparatory treatments, including medication and unwarranted surgery, Lupita's doctors finally admitted they would not perform donor insemination for her because she is a lesbian. The doctors claimed a right not to comply with California's public accommodations law due to their fundamentalist Christian views against treating lesbian patients as they treat others. In a unanimous decision, the California Supreme Court held that religious liberty protections do not authorize doctors to violate the civil rights of lesbian patients. *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008).[83]

- Counseling student's objections to providing relationship counseling to same-sex couples. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (finding student unlikely to prevail on free speech and religious liberty claims challenging her expulsion from counseling program due to her religiously based refusal to counsel same-sex couples, contrary to professional standards requiring nonjudgmental, nondiscriminatory treatment of all patients).[84]

- Physician's objection to working with an LGB person. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539-540 (W.D. Ky. 2001) (physician's religious beliefs did not exempt him from law prohibiting employment discrimination based on sexual orientation or gender identity), *vacated on other grounds by* 53 Fed. Appx. 740 (6th Cir. 2002).[85]

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[81] Medina & Mahowald, *supra* n. 27.
[82] Lambda Legal Comment Letter on U.S. Dept. HHS Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 78 FR 46558, (Aug. 01, 2013), https://www.regulations.gov/comment/HHS-OCR-2013-0007-0161.
[83] *Id* at 32.
[84] Id.
[85] Id.

- Proselytizing to patients concerning religious condemnation of homosexuality. *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (rejecting free exercise wrongful termination claim of visiting nurse fired for antigay proselytizing to home-bound AIDS patient).[86]

- Refusal to process lab specimens from persons with HIV. *Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (rejecting religious discrimination claim of lab technician fired for refusing to do tests on specimens labeled with HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").[87]

In addition, testimonies received in Lambda Legal's health survey describe similar encounters with health professionals who felt free to express their religiously grounded bias toward LGBT patients:

- Kara in Philadelphia, PA: "Since coming out, I have avoided seeing my primary physician because when she asked me my sexual history, I responded that I slept with women and that I was a lesbian. Her response was, 'Do you know that's against the Bible, against God?'"[88]

- Joe in Minneapolis, MN: "I was 36 years old at the time of this story, an out gay man, and was depressed after the breakup of an eight-year relationship. The doctor I went to see told me that it was not medicine I needed but to leave my 'dirty lifestyle.' He recalled having put other patients in touch with ministers who could help gay men repent and heal from sin, and he even suggested that I simply needed to 'date the right woman' to get over my depression. The doctor even went so far as to suggest that his daughter might be a good fit for me."[89]

Lambda Legal documented additional recent examples of health care denials or discriminatory treatment in its amicus brief to the Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[90] including the following two Lambda Legal cases:

- Lambda Legal client Naya Taylor, a transgender woman in Mattoon, Illinois, who sought hormone replacement therapy (HRT), a treatment for gender dysphoria, from the health clinic where she had received care for more than a decade. When her primary care physician refused her this standard treatment, clinic staff told her that, because of

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[86] *Id.* at 32-33
[87] *Id* at 33.
[88] *Id*.
[89] *Id*.
[90] *See* Brief of Amici Curiae Lambda Legal et al., *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) (No. 16-111), at 11-14, 17-18, 26, 30, available at https://www.lambdalegal.org/in-court/legal-docs/us_masterpiece-cakes_20171030_amicus-brief.

the religious beliefs of the clinic's doctors, they do not have to treat "people like you."[91]

- Lambda Legal client Jionni Conforti, who was refused a medically necessary hysterectomy despite his treating physician's desire to perform the surgery. The hospital where the surgeon had admitting privileges was religiously affiliated and withholds permission for all gender transition-related care.[92]

These examples are just a tip of the iceberg, a few of many incidents across the country in which religion has been used to justify denial of health care or other discrimination against LGBT people and people living with HIV. Although courts consistently have rejected such reliance on religion to excuse discrimination, examples of religion-based discrimination in health care continue to occur with regularity.[93] This mistreatment contributes to persistent health disparities, including elevated rates of stress-related conditions.[94]

VI. The 2019 Final Rule Was Contrary To The Department's Mission.

In addition to the legal and ethical conflicts it generated, the 2019 Final Rule also undermined HHS's national and local efforts to reduce LGBT health disparities. As reported in the 2014 National Health Statistics Reports:

> [R]ecent studies have examined the health and health care of lesbian, gay, and bisexual (LGB) populations and have found clear disparities among sexual minority groups (i.e., gay or lesbian and bisexual) and between sexual minorities and straight populations. These disparities appear to be broad-ranging, with differences identified for various health conditions (e.g., asthma, diabetes, cardiovascular disease, or disability) … health behaviors such as smoking and heavy drinking … and health care access

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[91] In April 2014, Lambda Legal filed a claim of sex discrimination on Ms. Taylor's behalf under Section 1557 of the ACA; however, Ms. Taylor subsequently passed away and her case was voluntarily dismissed. *See* Complaint, *Taylor v. Lystila*, 2:14-cv-02072, (C.D. Ill. 2014), ECF No. 01, available at https://www.lambdalegal.org/in-court/legal-docs/taylor_il_20140416_complaint.

[92] See *Conforti v. St. Joseph's Healthcare Sys*., No. 2:17-cv-00050, (D. N.J. Sept. 27, 2021). See also Amy Littlefield, Catholic Hospital Denies Transgender Man a Hysterectomy on Religious Grounds, Rewire News Group, Aug. 31, 2016, https://rewirenewsgroup.com/2016/08/31/catholic-hospital-denies-transgender-man-hysterectomy-on-religious-grounds/.

[93] *See* Lambda Legal Comment, *supra n.* 80; Brief of Amici Curiae Lambda Legal et al., *Zubik v. Burwell*, 578 U.S. 403 (2016), Nos. 14-1418 et. al.

[94] *See* Mark Hatzenbuehler, *Structural Stigma: Research Evidence and Implications for Psychological Science*, 71 Am. Psychologist 742, 742–51 (2016), http://dx.doi.org/10.1037/amp0000068; IOM Report, *supra* n. 27.

> and service utilization …. Across most of these outcomes, sexual minorities tend to fare worse than their nonminority counterparts.[95]

Thus, for example, the Department's "Healthy People 2020 initiative" and the Institute of Medicine have called for steps to be taken to address LGBT health disparities"[96]; medical associations including the American Medical Association, the Association of American Medical Colleges, the American College of Physicians, the American Psychiatric Association, and others are committed to improving medical care for LGBT people through education and cultural competency training; and legislation is increasingly being considered and passed to improve LGBT health access and reduce health disparities.[97] The 2019 Final Rule endangered important progress made on this front.

VII. Conclusion

Thank you for the opportunity to comment on this 2023 NPRM. Lambda Legal supports the Department's decision to rescind in large part the 2019 Rule and return to the 2011 Rule framework. The 2019 Final Rule failed to account for harm to patients or to address how providers can ensure continuity of care while complying with it. It directly conflicted with existing federal laws prohibiting discrimination in healthcare and protecting access to care and information. And it went well beyond the federal statutes on which it is purportedly based. The 2019 Final Rule also violated the Constitution because it favored religion over nonreligion and certain religious beliefs over others; jeopardized access to reproductive and gender-affirming healthcare; fostered unlawful discrimination; chilled protected expression; and exceeded Congress's Spending Clause authority. It put patients' health and even lives at risk. It was ill conceived and had no place in federal health policy.

Most respectfully,

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[95] Brian W. Ward et al., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, CDC, Nat'l Health Statistics Report No. 77, 1 (July 15, 2014), https://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf.

[96] Office of Disease Prevention and Health Promotion, *Healthy People 2020: LGBT Health* (last visited Mar. 6, 2023) https://wayback.archive-it.org/5774/20220413203148/https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health; IOM Report, *supra n. 27*.

[97] *See* Timothy Wang, et al., *The Current Wave of Anti-LGBT Legislation: Historic Context and Implications for LGBT Health* 6, 8-9 (The Fenway Inst. June 2016), http://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Exemption-Brief-June-2016.pdf.

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