

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES *et al.*,

Defendants.

DR. REGINA FRONT and CHRISTIAN
MEDICAL AND DENTAL
ASSOCIATIONS,

Defendants-Intervenors.

19 Civ. 4676 (PAE) (lead)

19 Civ. 5433 (PAE) (consolidated)

19 Civ. 5435 (PAE) (consolidated)

**BRIEF OF NATIONAL CENTER FOR LESBIAN RIGHTS ET AL. AS AMICI CURIAE
IN SUPPORT OF PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION
AND SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICI CURIAE..... 1

ARGUMENT 8

I. THE FINAL RULE WILL HARM LGBTQ PATIENTS..... 8

 A. LGBTQ People Face Significant Barriers to Accessing Health Care, Including
 Pervasive and Harmful Discrimination in Health Care Settings. 9

 B. The Final Rule Will Exacerbate Barriers to Health Care for LGBTQ People. 19

CONCLUSION..... 23

TABLE OF AUTHORITES

	Page(s)
Cases	
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006).....	9
<i>Kelly v. Honeywell Int’l, Inc.</i> , 933 F.3d 173 (2d Cir. 2019).....	9
<i>Prescott v. Rady Children’s Hospital-San Diego</i> , 265 F. Supp. 3d 1090 (C.D. Cal. 2017)	16
Statutes	
42 U.S.C. § 18116(a)	22
Regulations	
Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019)	<i>passim</i>
Other Authorities	
Abby Phillip, <i>Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It</i> , Washington Post (Feb. 19, 2015), https://perma.cc/V8ZQ-BWVK	12
Am. Medical Ass’n, House of Delegates, Resolution 122 (A-08), Resolution on Removing Financial Barriers to Care for Transgender Patients (2008), https://perma.cc/D88W-AZTU	20, 22
Am. Psychiatric Ass’n, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (5th ed. 2013).....	20
Andrew Satter & Sarah McBride, Ctr. for Am. Progress, <i>Their Baby Was Denied Access to Care Because They Are Gay</i> (July 21, 2015), https://perma.cc/WUR8-UJFL	12
Ann P. Haas et al., Am. Foundation for Suicide Prevention & UCLA Williams Inst., <i>Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey</i> (2014), https://perma.cc/R3B6-4EL5	19

Carl G. Streed et al., *Association Between Gender Minority Status and Self-Reported Physical and Mental Health in the United States*, 177 JAMA Internal Medicine 1210 (2017), <https://perma.cc/5XU9-VBC2>18

Christine Grimaldi, *It’s ‘Scary,’ But Transgender Patients Are Fighting Trump’s Health-Care Discrimination Agenda*, Rewire.News (Mar. 13, 2018), <https://perma.cc/AHF3-YQKR>12, 17

Human Rights Watch, *All We Want Is Equality: Religious Exemptions and Discrimination Against LGBT People in the United States* (2018), <https://perma.cc/XM5N-NC2G>13

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Inst. of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011), <https://perma.cc/G9RY-SBXN>9, 10

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Karen I. Fredriksen-Goldsen et al., *Health Disparities Among Lesbian, Gay, and Bisexual Older Adults: Results from a Population-Based Study*, 103 Am. J. Pub. Health 1802 (2013), <https://perma.cc/27PX-BX7R>10

Karen I. Fredriksen-Goldsen et al., *Physical and Mental Health of Transgender Older Adults: An At-Risk and Underserved Population*, 54 Gerontologist 488 (2014), <https://perma.cc/RK3L-7MMS>10

Kellan Baker & Laura E. Durso, Ctr. for Am. Progress, *Why Repealing the Affordable Care Act Is Bad Medicine for LGBT Communities* (Mar. 22, 2017), <https://perma.cc/ZWH5-TXZK>9

Kristie L. Seelman et al., *Transgender Noninclusive Healthcare and Delaying Care Because of Fear: Connections to General Health and Mental Health Among Transgender Adults*, 2.1 Transgender Health 18 (2017), <https://perma.cc/3CZZ-JDWK>11, 18

Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s Survey of Discrimination Against LGBT People and People with HIV* (2010), <https://perma.cc/B8TC-MJS4>10, 11, 15

Lourdes Ashley Hunter et al., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All* (2018), <https://perma.cc/DC6H-228W>9

Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities in Access to Care*, 36 Health Affairs 1786 (2017).....10

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S.E. James et al., Nat’l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey* (2016), <https://perma.cc/86HL-NJC4> *passim*

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U.S. Ctrs. for Disease Control & Prevention, *About LGBT Health*, <https://perma.cc/C3WD-NEKY>10

U.S. Ctrs. for Disease Control & Prevention, *HIV and African American Gay and Bisexual Men*, <https://perma.cc/5X46-X9E5>10

U.S. Dep’t of Health & Hum. Servs., *About HHS*, <https://perma.cc/5DGR-TNMM>.....8

U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, <https://perma.cc/UQ43-E75T>.....10, 19

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IDENTITY AND INTEREST OF AMICI CURIAE¹

Amici are national, state, and local organizations that share an interest in ensuring the equal treatment of lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people, including in the context of access to health care.

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in eradicating discrimination against LGBTQ people in healthcare settings and represents LGBTQ people in cases relating to access to healthcare in courts throughout the country.

Bay Area Lawyers for Individual Freedom (BALIF) is a bar association of approximately 500 lesbian, gay, bisexual, transgender, queer and intersex (“LGBTQI”) members in the San Francisco Bay Area legal community. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBTQI community at large. For nearly 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQI people and has authored and joined amicus efforts concerning matters of broad public importance.

¹ No party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money intended to fund the preparation or submission of this brief. No person – other than Amici, their members, or their counsel – contributed money intended to fund the preparation of this brief.

The **Center for Constitutional Rights (CCR)** is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory state policies, including policies that disproportionately impact LGBTQI communities of color.

Founded in 1999, **Equality California (EQCA)** is the nation's largest statewide lesbian, gay, bisexual, transgender and queer ("LGBTQ") civil rights organization. Equality California brings the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve. Equality California frequently participates in litigation in support of the rights of LGBTQ persons.

Equality Federation is the strategic partner to state-based equality organizations advocating on behalf of LGBTQ people. Since 1997, we have worked throughout the country with our member organizations to make legislative and policy advances on critical issues including marriage, nondiscrimination, safe schools, and healthy communities.

The **Empire Justice Center** is a New York-based multi-issue, multi-strategy public interest law firm founded in 1973 that is focused on changing the systems within which poor and low-income families live, including those marginalized based upon sexual orientation, gender identity and gender expression. We believe in the critical importance of eliminating discrimination and harassment in all forms and ensuring that all people do not face discriminatory barriers when seeking health care or in any public benefit or public

accommodation. Our core practice includes ensuring the legal and civil rights of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) individuals and their families and ensuring full and equal access to health care and services. We advance our work through impact litigation and direct legal services, policy advocacy, training, and education.

Family Equality (formerly Family Equality Council) is a national organization that advances lived and legal equality for LGBTQ families and those who wish to form them. Since its founding in 1979, Family Equality has worked to change attitudes, laws, and policies through advocacy and public education to ensure that all families, regardless of creation or composition, are respected, loved, and celebrated in all aspects of their life. Given the profound impact that health care has on an individual and their family, Family Equality has an ongoing interest in ensuring that LGBTQ people have equal access to quality health care services and are able to receive health care from welcoming and affirming providers.

FORGE is a 25-year-old, national transgender anti-violence organization. The people we work with are survivors of all types of crime and trauma, and frequently need both acute and long-term medical care, which they are all too often denied.

FreeState Justice, Inc. (FreeState) is Maryland's statewide legal advocacy organization that seeks to improve the lives of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people. FreeState advocates for LGBTQ Marylanders by combining direct legal services with education and outreach to ensure that the LGBTQ community receives fair treatment in the law and in society. As such, FreeState has a particular interest in ensuring the equal treatment of LGBTQ individuals seeking to access health care.

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** works in New England and nationally to create a just society

free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. Since its founding in 1978, GLAD has zealously advocated for LGBTQ people and people living with HIV/AIDS who have been profoundly harmed by discrimination in access to healthcare by hospitals, healthcare providers, and insurers.

The **Human Rights Campaign (HRC)**, the largest national lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) advocacy organization, envisions an America where LGBTQ people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Equal treatment when seeking healthcare is among these basic rights.

Legal Voice, founded in 1978 as the Northwest Women’s Law Center, is a non-profit public interest organization in the Pacific Northwest dedicated to protecting the rights of women, girls, and LGBTQ people through litigation, legislative advocacy, and the provision of legal information and education. Legal Voice’s work includes decades of advocacy in the courts and in the Washington Legislature to advance the rights of LGBTQ people and their families to ensure that they are free from discrimination based on their sex, sexual orientation, and gender identity or expression. Legal Voice has participated as counsel and as *amicus curiae* in numerous cases throughout the Northwest and the country, and serves as a regional expert and advocate in the area of gender equality.

The **LGBT Bar Association of New York** is a non-profit bar organization based in New York, New York that is dedicated to promoting equality and access to justice for members of the LGBTQ community.

Movement Advancement Project (MAP) works to ensure that all people have a fair chance to pursue health and happiness, earn a living, take care of the ones they love, be safe in their communities, and participate in civic life. MAP provides independent and rigorous research, insight and communications that help speed equality and opportunity for all.

National Center for Transgender Equality (NCTE) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE works with policymakers and communities around the country to develop fair and effective public policy, including in the area of health care access for transgender people.

The **National LGBTQ Task Force** is the nation's oldest national LGBTQ advocacy group. As a progressive social-justice organization, the Task Force works to achieve full freedom, justice, and equality for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) people and their families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, retirement, and basic human rights. Recognizing that LGBTQ persons of color are subject to multifaceted discrimination, the Task Force is also committed to racial justice. To that end, the Task Force hosts the Racial Justice Institute at its annual Creating Change Conference, which equips individuals with skills to advance LGBTQ freedom and equality.

The **National Trans Bar Association (NTBA)** is a non-profit professional association of attorneys promoting equality both in the legal profession and under the law. In addition to working directly with transgender and gender non-conforming legal professionals, NTBA

seeks to educate and advocate for legislative change that expands formal legal protections and access to legal representation for transgender and gender non-conforming people.

One Colorado is the state's leading advocacy organization for LGBTQ Coloradans and their families. The mission of the organization is to secure protections and advance opportunities for LGBTQ Coloradans and their families.

OutFront Minnesota (OFM) is the largest advocacy organization for lesbian, gay, bisexual, transgender, and queer people in the Northstar State. OFM is dedicated to making Minnesota a place where people can be who they are, love whom they love, and live without fear of discrimination, harassment, or violence.

SAGE is the country's oldest and largest organization dedicated to improving the lives of LGBT older people. In conjunction with 30 affiliates in 22 states and Puerto Rico, SAGE offers supportive services and consumer resources to LGBT older people and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for agencies and organizations that serve LGBT older people. Pursuant to a grant from the Department of Health and Human Services' Administration for Community Living (ACL), SAGE—in collaboration with 18 leading organizations nationwide—operates the National Resource Center on LGBT Aging (NRC), which is the country's first and only technical assistance resource center aimed at improving the quality of services and supports offered to LGBT older people. The NRC provides training, technical assistance, and educational resources to aging providers, LGBT organizations, and LGBT older people. To date, the NRC and our training arm, SAGECare, have trained more than 50,000 professionals in every State and the District of Columbia. In addition, the NRC has published, and made widely available, best

practice guides, including, “Inclusive Services for LGBT Older Adults, A Practical Guide to Creating Welcoming Agencies.”

The **San Francisco LGBT Center (the Center)** connects San Francisco’s diverse LGBT community to opportunities, resources and each other to achieve our vision of a stronger, healthier, and more equitable world for LGBT people and our allies. The Center provides free services to community members in the areas of health & wellness, economic development, and youth services as well opportunities for LGBT people to connect and organize to secure equal rights for LGBT people.

Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Transgender Legal Defense and Education Fund, Inc. (TLDEF) is a national civil rights organization committed to achieving full recognition of transgender persons’ civil rights in

the United States. Since its founding in 2003, TLDEF has represented transgender persons who have experienced health care discrimination through advocacy, administrative appeals, administrative charges of discrimination, and impact litigation.

Amici submit this brief in support of Plaintiffs' motions for preliminary injunction and summary judgment to highlight the harm to lesbian, gay, bisexual, transgender, and queer ("LGBTQ") patients that will result if the challenged provisions of the U.S. Department of Health and Human Services' regulation "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23,170 (May 21, 2019) ("the Final Rule"), are not enjoined.²

ARGUMENT

I. THE FINAL RULE WILL HARM LGBTQ PATIENTS.

The mission of the Department of Health and Human Services ("HHS") is "to enhance and protect the health and well-being of all Americans," which HHS fulfills "by providing for effective health and human services and fostering advances in medicine, public health, and social services."³ HHS has an important role in ensuring equal access to health care and ending

² Many Amici submitted comments expressing concerns with the proposed rule. *See* Comment Nos. HHS-OCR-2018-0002-69074 (NCLR) ("NCLR Comment"); HHS-OCR-2018-0002-71044 (Equality California); HHS-OCR-2018-0002-71892 (Empire Justice Center); HHS-OCR-2018-0002-69268 (HIV Health Care Access Work Group, joined by Equality Federation); HHS-OCR-2018-0002-70389 (Family Equality Council); HHS-OCR-2018-0002-69877 (Forge, Inc.); HHS-OCR-2018-0002-34036 (FreeState Justice, Inc.); HHS-OCR-2018-0002-70466 (GLBTQ Legal Advocates & Defenders); HHS-OCR-2018-0002-70848 (Human Rights Campaign); HHS-OCR-2018-0002-68010 (Movement Advancement Project); HHS-OCR-2018-0002-71274 (National Center for Transgender Equality); HHS-OCR-2018-0002-71509 (National LGBTQ Task Force); HHS-OCR-2018-0002-58212 (One Colorado Education Fund); HHS-OCR-2018-0002-68429 (SAGE); HHS-OCR-2018-0002-71816 (Transgender Law Center); HHS-OCR-2018-0002-71256 (New York State LGBT Health & Human Services Network, joined by Transgender Legal Defense and Education Fund, Inc.).

³ U.S. Dep't of Health & Hum. Servs., *About HHS*, <https://perma.cc/5DGR-TNMM>.

discriminatory practices contributing to poor health outcomes and health disparities.⁴ But the Final Rule will do exactly the opposite. In particular, the Final Rule will harm LGBTQ patients, who already face significant barriers to health care, including pervasive and harmful discrimination in health care settings. It will invite discrimination and exacerbate the barriers LGBTQ people face in accessing care. The harm the Final Rule will cause to LGBTQ patients supports the grant of injunctive relief. *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (articulating test for permanent injunction); *Kelly v. Honeywell Int’l, Inc.*, 933 F.3d 173 (2d Cir. 2019) (articulating test for preliminary injunction).

A. LGBTQ People Face Significant Barriers to Accessing Health Care, Including Pervasive and Harmful Discrimination in Health Care Settings.

LGBTQ people face significant barriers to accessing health care, including higher rates of poverty,⁵ unemployment,⁶ and uninsurance⁷ than people who are not LGBTQ. LGBTQ people also experience health disparities,⁸ which are particularly severe for older adults, youth,

⁴ *See* NCLR Comment, *supra*, at 2-3 & n.3, 4 (discussing earlier efforts of HHS to reduce discrimination in health care by addressing practices such as segregation in health care facilities based on race or disability, categorical insurance coverage denials of gender-affirming medical care, and insurance plans that discriminate against people living with HIV).

⁵ *See* Lourdes Ashley Hunter et al., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All* 4-5 (2018), <https://perma.cc/DC6H-228W> (finding that LGBTQ people are more likely than non-LGBTQ people to live in poverty); *id.* at 63-76 (discussing barriers to accessing health care for low-income LGBTQ people); Human Rights Watch, “*You Don’t Want Second Best*”: *Anti-LGBT Discrimination in US Health Care* 17 (2018), <https://perma.cc/79KG-W3QU>.

⁶ Rich Bellis, *LGBTQ Workers Still Face Higher Unemployment Rates*, Fast Company (Nov. 8, 2017), <https://perma.cc/X9LU-WPEP>; S.E. James et al., Nat’l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey* 98 (2016), <https://perma.cc/86HL-NJC4>.

⁷ Kellan Baker & Laura E. Durso, Ctr. for Am. Progress, *Why Repealing the Affordable Care Act Is Bad Medicine for LGBT Communities* (Mar. 22, 2017), <https://perma.cc/ZWH5-TXZK> (finding that 15% of LGBT respondents and 25% of transgender respondents were uninsured in 2017, compared to 7% of non-LGBT people).

⁸ *See, e.g.,* Inst. of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 1 (2011), <https://perma.cc/G9RY-SBXN>.

transgender people, and people of color.⁹ As HHS’s Healthy People 2020 initiative has recognized, these disparities are linked to stigma and discrimination: “LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights.”¹⁰ HHS has also stated that “[s]ocial determinants affecting the health of LGBT individuals largely relate to oppression and discrimination.”¹¹ A recent study found that individuals face significant barriers to health care as a result of discrimination based on a number of often intersecting factors, including transgender status, sexual orientation, race, and economic factors.¹² As described below, LGBTQ people experience widespread discrimination in health care settings, which causes severe and lasting harm.

Discrimination against LGBTQ people in health care settings is well-documented,¹³ particularly with respect to transgender people, who “are often forced to navigate a healthcare

⁹ See, e.g., U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, <https://perma.cc/UQ43-E75T> (“Healthy People 2020”); Karen I. Fredriksen-Goldsen et al., *Physical and Mental Health of Transgender Older Adults: An At-Risk and Underserved Population*, 54 *Gerontologist* 488 (2014), <https://perma.cc/RK3L-7MMS>; Karen I. Fredriksen-Goldsen et al., *Health Disparities Among Lesbian, Gay, and Bisexual Older Adults: Results from a Population-Based Study*, 103 *Am. J. Pub. Health* 1802 (2013), <https://perma.cc/27PX-BX7R>; U.S. Ctrs. for Disease Control & Prevention, *HIV and African American Gay and Bisexual Men*, <https://perma.cc/5X46-X9E5>.

¹⁰ U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020*, *supra*.

¹¹ *Id.* The CDC has similarly recognized that “[s]ocial inequality is often associated with poorer health status,” and some health disparities are “associated with social and structural inequities, such as the stigma and discrimination that LGBT populations experience.” U.S. Ctrs. for Disease Control & Prevention, *About LGBT Health*, <https://perma.cc/C3WD-NEKY>.

¹² Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities in Access to Care*, 36 *Health Affairs* 1786 (2017).

¹³ See, e.g., NCLR Comment, *supra*, at 4 & n.8; Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for Am. Progress, *Discrimination Prevents LGBTQ People from Accessing Health Care* (Jan. 18, 2018), <https://perma.cc/X9TN-5Q3U>; James et al., *supra*, at 93-125; Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s Survey of Discrimination Against LGBT People and People with HIV* (2010), <https://perma.cc/B8TC-MJS4>; see also Inst. of Medicine, *supra*, at 61-67 (discussing barriers that LGBT people face in accessing health care).

system that is resistant at best and at times openly hostile toward transgender people's needs."¹⁴ A 2010 study by Lambda Legal found that 56% of lesbian, gay, and bisexual respondents had experienced instances of discrimination in health care, such as refusal of health care, excessive precautions used by health care professionals, and physically rough or abusive behavior by health care professionals.¹⁵ Seventy percent of transgender and gender non-conforming respondents experienced the same, as had 63% of respondents living with HIV.¹⁶ The study also found that respondents of color and low-income respondents experienced higher rates of discrimination and substandard care.¹⁷ More recently, the 2015 U.S. Transgender Survey, a national survey of nearly 28,000 people, found that 33% of respondents who saw a health care provider in the past year had at least one negative experience related to being transgender, with a higher percentage for transgender men, people with disabilities, and those who identified as American Indian, Black, Middle Eastern, or multiracial.¹⁸ Types of negative experiences included: having to teach the provider about transgender people to get appropriate care, a health care provider asking unnecessary or invasive questions, being refused medical care, being verbally harassed in a health care setting, having a provider use harsh or abusive language when treating them, or being physically attacked or sexually assaulted in a health care setting.¹⁹

Outright refusals of care based on a patient's sexual orientation or gender identity are widespread, especially with respect to transgender people. A nationally representative study from

¹⁴ Kristie L. Seelman et al., *Transgender Noninclusive Healthcare and Delaying Care Because of Fear: Connections to General Health and Mental Health Among Transgender Adults*, 2.1 *Transgender Health* 18 (2017), <https://perma.cc/3CZZ-JDWK>.

¹⁵ Lambda Legal, *When Health Care Isn't Caring*, *supra*, at 5.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 11.

¹⁸ James et al., *supra*, at 96 fig.7.3.

¹⁹ *Id.*

the Center for American Progress in 2017 showed that among LGBTQ respondents who saw a health care provider in the past year, 29% of transgender respondents, and 8% of lesbian, gay, bisexual, and queer respondents, said a provider refused to see them because of their actual or perceived gender identity or sexual orientation.²⁰ Some denials of care involve specific services related to sexual orientation or transgender status, such as fertility or assisted reproductive services for a same-sex couple, or hormone therapy for a transgender person.²¹ And some are denials of care for medical treatments that are completely unrelated to the person's LGBTQ identity. For example, a respondent to a national survey of transgender people said, "I have been refused emergency room treatment even when delivered to the hospital by ambulance with numerous broken bones and wounds."²²

Many LGBTQ people have experienced a denial or delay of medical care due to a provider's religious beliefs. In 2015, a lesbian couple in Michigan brought their six-day-old newborn to the pediatrician for a check-up and were told the pediatrician would not see the infant because of the doctor's religious objections.²³ A social worker told Human Rights Watch that a transgender child was accepted for treatment at a religiously affiliated psychiatric practice, but

²⁰ Mirza & Rooney, *supra*.

²¹ For example, a transgender woman reported that when she asked her long-time doctor for help obtaining hormone therapy, the doctor "looked at me, and then she kind of hemmed and hawed . . . and she said, 'Well, I just don't believe in that, and I can't help you with that.'" Christine Grimaldi, *It's 'Scary,' But Transgender Patients Are Fighting Trump's Health-Care Discrimination Agenda*, Rewire.News (Mar. 13, 2018), <https://perma.cc/AHF3-YQKR>.

²² Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality & Nat'l Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 73 (2011), <https://perma.cc/9TGK-4GA3>.

²³ Andrew Satter & Sarah McBride, Ctr. for Am. Progress, *Their Baby Was Denied Access to Care Because They Are Gay* (July 21, 2015), <https://perma.cc/WUR8-UJFL>; Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, Washington Post (Feb. 19, 2015), <https://perma.cc/V8ZQ-BWVK>.

then turned away when the doctor learned the child was transgender.²⁴ As the social worker explained:

They accepted the person at first, but when they found out [the person] was a trans client, the doctor said we don't see trans clients here. They got in the door, but then got turned away. It often takes months to get an appointment here, and the family felt they had invested a lot of time to get in, and was then turned away.²⁵

A lesbian in Mississippi reported that when she and her wife were seeking a fertility doctor in 2012, the receptionist said that the doctor would not see them because “[i]t’s his religious belief that he only treats straight married couples.”²⁶ Human Rights Watch also reported that the mother of a gay teenager called a pediatric practice and said, “we’ve seen you our whole life and our son is gay and we just wanted to make sure it wouldn’t be an issue,” to which the pediatrician replied, “you need to understand this is a Christian-based office and we may not be a good fit for your family any longer.”²⁷ And at Catholic hospitals, based on religious directives, transgender men have experienced the abrupt cancellation of medically necessary, scheduled hysterectomies, even though those hospitals permit hysterectomies to be performed for patients who are not transgender.²⁸

Denying necessary medical care for any reason, including a provider’s religious beliefs, has direct health consequences for patients. As UCLA’s Williams Institute stated in comments

²⁴ Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 19.

²⁵ *Id.*

²⁶ Human Rights Watch, *All We Want Is Equality: Religious Exemptions and Discrimination Against LGBT People in the United States* 21 (2018), <https://perma.cc/XM5N-NC2G>.

²⁷ *Id.* at 22.

²⁸ *Minton v. Dignity Health*, First Am. Compl., No. 17-558259 (Cal. Super. Ct), <https://perma.cc/T2WP-GWE2>; *Knight v. St. Joseph Health*, Compl., No. DR190259 (Cal. Super. Ct.), <https://perma.cc/3EP5-XUFR>; *Conforti v. St. Joseph Healthcare Sys. Inc.*, Compl., No. 2:17-cv-00050-JAL-JAD (D.N.J.); *see also* NCLR Comment, *supra*, at 9 (describing experience of a transgender caller to NCLR help line whose hysterectomy was denied by a Catholic hospital).

on the proposed Rule, “[a]n individual who is denied care must, at a minimum, experience the inconvenience of seeking alternative providers for the service,” which “can be especially critical for individuals who live in communities where no such alternatives are available or where reaching an alternative care provider can only be done with great cost and effort.”²⁹ LGBTQ people often have to travel long distances to find LGBTQ-friendly providers or to receive specific care. For example, the U.S. Transgender Survey reported that 29% of respondents seeking transition-related care had to travel 25 miles or more to access it.³⁰ Human Rights Watch interviewed LGBTQ people who described driving across Michigan to find a friendly nurse practitioner or medical practice, driving from East Tennessee to North Carolina for regular hormone injections, and traveling two hours each way to attend therapy or meet with a trans-affirming doctor in another state.³¹ In the 2017 study from Center for American Progress, nearly 1 in 5 LGBTQ people, including 31% of transgender people, said that if they were turned away by a hospital, it would be “very difficult” or “not possible” to find the same type of service at another hospital.³² The rate was much higher – 41% – for LGBTQ people living outside of a metropolitan area.³³ For these patients, being turned away by a medical provider may result in being denied care entirely.³⁴

Even when doctors or other providers do not turn them away, LGBTQ people experience other forms of discrimination in health care settings. In an example shared by Lambda Legal, a

²⁹ UCLA Williams Institute, Comment Letter on Proposed Rule on Protecting Statutory Conscience Rights in Health Care 9 (Mar. 27, 2018), HHS-OCR-2018-0002-72082.

³⁰ James et al., *supra*, at 99 fig.7.7.

³¹ Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 14.

³² Mirza & Rooney, *supra*.

³³ *Id.*

³⁴ See also NCLR Comment 6-7 (describing challenges LGBTQ people in rural communities face in accessing adequate health care, including that health-care disparities in general are often more pronounced in rural areas, and this is further compounded for LGBTQ people).

lesbian in Texas brought her two-year old child to a pediatric dentist after the child fell and her tooth was knocked out.³⁵ The dentist asked who was the “real mother,” said “a child cannot have two mothers,” and told the mother that he would only see the “biological mother” (with a birth certificate as proof) before he would treat the child.³⁶ Such incidents are not isolated. The 2017 Center for American Progress study reported that among lesbian, gay, bisexual, and queer respondents who had visited a doctor or health care provider in the year before the survey, 7% said that a doctor or other provider refused to recognize their family, including a child or same-sex spouse or partner; 9% said that a doctor or other provider used harsh or abusive language when treating them; and 7% said they experienced unwanted physical contact from a doctor or other health care provider (such as fondling, sexual assault, or rape).³⁷ LGBTQ people of color are more vulnerable than white LGBTQ people to discrimination and mistreatment. For example, Lambda Legal’s 2010 study found that lesbian, gay, or bisexual respondents of color were more than twice as likely as white respondents to have experienced physically rough or abusive treatment by medical professionals.³⁸

Transgender people are particularly likely to experience discrimination and mistreatment in health care settings. In the 2017 Center for American Progress study, 23% of transgender respondents who had seen a doctor or other health care provider in the past year said a healthcare provider intentionally refused to recognize their gender identity and deliberately referred to them by the wrong name or pronouns.³⁹ As the mother of a transgender teenager told Human Rights

³⁵ See Br. of Amici Curiae Lambda Legal Defense & Education Fund, Inc., Family Equality Council, et al. in Support of Respondents 18-19, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111, <https://perma.cc/SQ2F-XG5N>.

³⁶ *Id.*

³⁷ Mirza & Rooney, *supra*.

³⁸ Lambda Legal, *When Health Care Isn’t Caring*, *supra*, at 12.

³⁹ Mirza & Rooney, *supra*.

Watch, “I said these are his name and his pronouns and he was sitting there, and the doctor uses his birth name and pronouns After the doctor left, [my son] cried for a solid ten minutes, and said I don’t want to come back here ever again.”⁴⁰ A respondent to the U.S. Transgender Survey shared, “I was consistently misnamed and misgendered throughout my hospital stay. I passed a kidney stone during that visit. On the standard 1-10 pain scale, that’s somewhere around a 9. But not having my identity respected, that hurt far more.”⁴¹

Providers’ refusal to recognize a transgender patient’s gender identity by deliberately refusing to use a transgender person’s name and pronouns can also result in dangerous denials of care. NCLR and Transgender Law Center represented the mother of Kyler Prescott, a transgender boy, who was admitted to a hospital inpatient psychiatric unit in San Diego because of his suicidal thoughts. *See Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090, 1096 (C.D. Cal. 2017) (citing complaint). Although hospital staff assured Kyler’s mother that Kyler’s gender identity would be respected and that staff would refer to Kyler with male gender pronouns, staff repeatedly addressed and referred to Kyler as a girl. Kyler reported that one employee said, “Honey, I would call you he, but you’re such a pretty girl.” *Id.* at 1097 (quoting complaint). “Despite concerns over Kyler’s continuing depression and suicidal thoughts, Kyler’s medical providers concluded that he should be discharged early from the hold at [the hospital] because of the staff’s conduct.” *Id.* (citing complaint).

Transgender people are also disproportionately likely to experience mockery, harsh and abusive language, and unwanted physical contact from healthcare providers and office staff. The Center for American Progress found that that among transgender respondents who visited a

⁴⁰ Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 20.

⁴¹ James et al., *supra*, at 96.

doctor or other health care provider in the past year, 21% said a doctor or other health care provider used harsh or abusive language in treating them, and 29% said they experienced unwanted physical contact (such as fondling, sexual assault, or rape) from a doctor or other health care provider.⁴² A respondent to another national survey reported, “I was forced to have a pelvic exam by a doctor when I went in for a sore throat. The doctor invited others to look at me while he examined me and talked to them about my genitals.”⁴³ Human Rights Watch reported an incident where a transgender woman was being treated for cardiomyopathy, and a nurse “left the room[] and audibly told another nurse to come look at [the patient’s] breasts.”⁴⁴ Another transgender woman reported hearing nurses’ and office staff’s “giggles” and “snickers” when she began to live openly as a transgender woman.⁴⁵

Fear of discrimination in health care settings deters and delays LGBTQ people from seeking necessary medical care. For example, a mother told Human Rights Watch that her transgender son had not been to the dentist in two years due to fear of discrimination, and another interviewee said that her same-sex partner, a nurse, had never been to the gynecologist because she was afraid of how she might be treated.⁴⁶ In the U.S. Transgender Survey, 23% of respondents did not see a doctor in the past year when they needed to because of fear of being mistreated.⁴⁷ As one respondent described:

Multiple medical professionals have misgendered me, denied to me that I was transgender or tried to persuade me that my trans identity was just a misdiagnosis of something else, have made jokes at my expense in front of me and behind my back, and have made me feel physically unsafe. I often do not seek medical

⁴² Mirza & Rooney, *supra*.

⁴³ Grant, *supra*, at 74.

⁴⁴ Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 19.

⁴⁵ Grimaldi, *supra*.

⁴⁶ Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 25-26.

⁴⁷ James et al., *supra*, at 98.

attention when it is needed, because I'm afraid of what harassment or discrimination I may experience in a hospital or clinic.⁴⁸

Those who have experienced discrimination in healthcare settings are even more likely to avoid or delay necessary medical care. As the Center for American Progress study found, LGBTQ people who had experienced discrimination in the past year were nearly *seven times more likely* than people who had not experienced discrimination in the past year to avoid doctor's offices.⁴⁹ A recent study of transgender people found "a significant association between delaying needed healthcare in the past year because of fear of discrimination and worse general health and mental health (current depression, suicidal ideation, and suicide attempts)."⁵⁰

The examples discussed above show the range of harms resulting from discrimination against LGBTQ people in health settings, including the practical harms when specific medical care is delayed or denied, the emotional harm resulting from the experience of discrimination, and poor health outcomes. As UCLA's Williams Institute explained in a comment to the proposed rule, "refusals of service based on sexual orientation or gender identity are 'minority stressors' that can profoundly harm the health and well-being of LGBT people who are directly subject to these refusals of service."⁵¹ In particular, "[w]hen a health care provider denies care or provides lesser care to an LGBT person because of their sexual orientation or gender identity – regardless of the intent behind the discrimination – it is a prejudice event, a type of minority stress, which has both tangible and symbolic impacts on the LGBT patient."⁵² As noted above,

⁴⁸ *Id.* at 96.

⁴⁹ *See* Mirza & Rooney, *supra*.

⁵⁰ Seelman et al., *supra*, at 25.

⁵¹ UCLA Williams Inst. Comment 8-9.

⁵² *Id.* at 9. This is consistent with research on "minority stress," a framework for understanding high rates of poor mental health and other disparities in a minority population resulting from chronic stressors such as stigma and discrimination. *See, e.g.*, Seelman et al., *supra*, at 19 (reviewing studies); Carl G. Streed et al., *Association Between Gender Minority Status and Self-*

HHS’s Healthy People 2020 initiative has recognized that LGBTQ health disparities are linked to stigma and discrimination.⁵³ The U.S. Transgender Survey found that transgender people were nearly eight times more likely than the general population to be experiencing significant psychological distress, which was “associated with a variety of experiences of rejection, discrimination, and violence.”⁵⁴ In addition, *sixty percent* of respondents in a national study of transgender and gender non-conforming people who had been refused medical care because of anti-transgender bias reported a lifetime suicide attempt, a rate significantly higher than the percentage of respondents as a whole.⁵⁵

B. The Final Rule Will Exacerbate Barriers to Health Care for LGBTQ People.

The Final Rule will compound barriers to health care for LGBTQ people, particularly those who are transgender, by inviting healthcare workers to refuse services or referrals to LGBTQ people. HHS contemplates that more healthcare workers will raise religious- or conscience-related objections: it states that “[t]he Department expects that, as a result of this rule, more individuals, having been apprised of those rights, will assert them.” 84 Fed. Reg. at 23,250. And although HHS fails to adequately consider the costs to patients who will be denied care as a result of the Final Rule,⁵⁶ it acknowledges that “[d]ifferent types of harm can result from denial of a particular procedure based on an exercise of belief or conviction.” 84 Fed. Reg. at 23,251.

HHS provides no evidence for its unsupported assertion that Final Rule will generate “significant

Reported Physical and Mental Health in the United States, 177 JAMA Internal Medicine 1210 (2017), <https://perma.cc/5XU9-VBC2>.

⁵³ U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020*, *supra*.

⁵⁴ James et al., *supra*, at 105-07.

⁵⁵ Ann P. Haas et al., Am. Foundation for Suicide Prevention & UCLA Williams Inst., *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* 12 & tbl.18 (2014), <https://perma.cc/R3B6-4EL5>.

⁵⁶ See generally Amicus Curiae Br. of Institute for Policy Integrity.

overall increases in access” to health care. *Id.* at 23,252. This speculation flies in the face of the well-documented experiences of LGBTQ people in health care settings and the wide-ranging, lasting harms that result from denials of care, as well as the fear of denials of care or other forms of discrimination. As discussed below, the Final Rule will result in an increase in refusals of care to LGBTQ patients, particularly transgender people, and ambiguous language in the Final Rule may be misinterpreted to permit wider, status-based discrimination against LGBTQ patients.

First, the Final Rule will harm transgender patients seeking medically necessary, and in some cases, lifesaving medical procedures to treat gender dysphoria, the medical diagnosis characterized by the distress that arises from incongruence between a person’s gender identity and the person’s assigned sex at birth.⁵⁷ Gender dysphoria is a serious medical condition: if untreated, it can lead to “clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.”⁵⁸ It can, however, “in large part be alleviated through treatment.”⁵⁹

The Final Rule, although ambiguous, appears to suggest that HHS may consider certain treatments for gender dysphoria as “sterilization.” But procedures performed for the purpose of sterilization are different from treatments or procedures performed for other purposes, such as

⁵⁷ See Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 451-53 (5th ed. 2013).

⁵⁸ Am. Medical Ass’n, House of Delegates, Resolution 122 (A-08), Resolution on Removing Financial Barriers to Care for Transgender Patients 2 (2008), <https://perma.cc/D88W-AZTU>.

⁵⁹ World Professional Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 1 (7th Version 2011), <https://perma.cc/FYN2-YZQX>. While specific treatments must be determined on an individualized basis, treatments for gender dysphoria can include: mental health services, such as assessment, counseling, and psychotherapy; social transition (living one’s life in accordance with one’s gender identity); hormone treatment; and surgical procedures. *See id.* at 9-10; World Professional Ass’n for Transgender Health, *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* 3 (Dec. 21, 2016), <https://perma.cc/N3SL-NZQ5>.

surgical treatments to treat gender dysphoria, that may also affect reproductive function. The Final Rule twice references *Minton v. Dignity Health*, No. 17-558259 (Cal. Super. Ct. Apr. 19, 2017), a lawsuit by a transgender man who challenged a Catholic hospital’s sudden cancellation of his hysterectomy, which Mr. Minton was undergoing as part of his course of treatment for gender dysphoria. The hospital cancelled Mr. Minton’s scheduled hysterectomy when it learned Mr. Minton was transgender, although the hospital routinely permits hysterectomies to be performed for patients who are not transgender.⁶⁰ HHS lists the *Minton* case as an example of lawsuits “claiming that Federal or State laws require private religious entities to perform . . . sterilizations,” 84 Fed. Reg. 23,178, and also includes the case in its “overview of reasons” for the Final Rule, *id.* at 23,176 n.27. In response to comments seeking clarification on HHS’s interpretation of “sterilization” and treatment for gender dysphoria, HHS states that it will consider any complaints on a “case-by-case basis.” *Id.* at 23,205.

The Rule thus appears to invite healthcare workers – defined extraordinarily broadly to include even a person who schedules procedures, *see id.* at 23,186 – to refuse certain treatment to transgender people, even if the provider routinely performs the same procedure, such as a hysterectomy, for patients who are not transgender. This will be extremely harmful. As noted above, while denials of any kind of needed medical care can have negative consequences, denial of treatment for gender dysphoria can be particularly devastating. Even if a patient who is refused care ultimately obtains the procedure sought from another provider or at another facility, delays in gender-affirming medical care exacerbate the gender dysphoria that the medical care is designed to treat. In addition, as the American Medical Association has recognized, delaying treatment for gender dysphoria “can cause and/or aggravate additional serious and expensive

⁶⁰ *See Minton v. Dignity Health*, First Am. Compl., *supra*.

health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health"⁶¹

Second, the Final Rule contains additional ambiguous language that may be misconstrued by healthcare workers and patients as permitting status-based discrimination against LGBTQ people, which is contrary to law and per se harmful, in addition to harming patients who will be denied services or referrals as a result. In response to comments expressing concern that the Rule would purport to cover areas beyond the scope of the underlying statutes, including "HIV treatment, pre-exposure prophylaxis, and infertility treatment," HHS did *not* say that such areas are outside the scope of the Final Rule or the underlying statutes. 84 Fed. Reg at 23,182. Rather, HHS states that if it receives a complaint regarding these procedures, it would "examine the facts and circumstances of the complaint to determine whether it falls within the scope of the statute in question and these regulations."⁶² *Id.* And in response to comments expressing concern that the rule could "impact counseling or referrals for LGBT *persons*," *id.* at 23,189 (emphasis added), HHS declined to clarify that the Final Rule does not authorize the denial of services based on a patient's sexual orientation or gender identity. Rather, HHS says it "does not pre-judge matters without the benefit of specific facts and circumstances," and that it will evaluate particular claims on a "case-by-case basis." *Id.* Nothing in the statutes underlying the Final Rule authorizes status-based discrimination based on a patient's sex, including sexual orientation and gender identity. Nor could it, as Section 1557 of the Affordable Care Act prohibits sex discrimination in health programs or activities receiving federal financial assistance. 42 U.S.C. § 18116(a). Rather

⁶¹ Am. Medical Ass'n, *supra*, at 2.

⁶² Plaintiffs such as Cook County and the State of Illinois anticipate religious or conscience objections to pre-exposure prophylaxis because some individuals believe it "condones homosexuality," for example. *See* Decl. of John Jay Shannon, MD ¶ 22, No. 19:cv-04676, Dkt. No. 43-49; Decl. of Dr. Ngozi O. Ezike, ¶ 38, No. 19:cv-04676, Dkt. No. 43-17.

than clearly affirming that such discrimination is unlawful, HHS appears to leave open the possibility that it would construe the statutes underlying the Final Rule in a way that would allow such mistreatment of LGBTQ people. This will only invite discrimination and discourage LGBTQ people from seeking necessary health care.

CONCLUSION

For the reasons above, Amici urge the Court to grant Plaintiffs' motions and enjoin the Final Rule.

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Respectfully submitted,

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