Susan Baker Manning, Bar No. 197350
Geraldine E. Edens
(*pro hac vice* application pending)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: +1.202.739.3000
Facsimile: +1.202.739.3001
susan.manning@morganlewis.com
geri.edens@morganlewis.com

Susan Feign Harris
(*pro hac vice* application pending)
MORGAN LEWIS & BOCKIUS LLP
1000 Louisiana Street
Houston, TX 77002-5005
Telephone: +1.713.890.5000
Facsimile: +1.713.890.5001
susan.harris@morganlewis.com

Attorneys for *Amicus Curiae*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, et al.,

Defendants.

Case Nos. 3:19-cv-2405-WHA
3:19-cv-2769-WHA
3:19-cv-2916-WHA

NOTICE OF MOTION AND UNOPPOSED MOTION TO FILE BRIEF AS *AMICI CURIAE*

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD,

PLEASE TAKE NOTICE THAT the National LGBT Cancer Network, Callen Lorde Community Health Center, Care Resource Community Health Centers, Inc., Howard Brown Health, Legacy Community Health Services, Inc., and the National LGBTQ Task Force (collectively, "Proposed *Amici*") hereby move this Court for leave to file the annexed brief as *amici curiae* in support of Plaintiffs' motion for summary judgment. Plaintiffs and for Defendants have consented to the filing of the *amicus* brief.

Proposed *Amici are* health care providers and advocates for the delivery of preventive, curative, and palliative cancer care to LGBT individuals to improve their lives.

- **The National LGBT Cancer Network** is a New York-based nonprofit organization that works to improve the lives of LGBT cancer survivors and those at risk for cancer through education, training of health care providers, and advocating for LGBT survivors in mainstream cancer organizations, the media, and research. LGBT Americans already face discrimination in the health care system—a problem that is particularly acute for transgender people. As part of its mission, the Cancer Network is intimately familiar with the body of research establishing that LGBT individuals are disproportionately affected by cancer and other serious illnesses and face significant barriers to accessing quality health care.
- **Callen-Lorde Community Health Center** provides sensitive, quality health care and related services to New York's LGBT communities regardless of ability to pay. To further its mission, Callen-Lorde promotes health education and wellness, and advocates for LGBTQ health issues.
- **Care Resource Community Health Centers, Inc**. is a nonprofit and Federally Qualified Health Center with four locations in South Florida. It

provides comprehensive health and support services to address the health care needs of pediatric, adolescent, and adult populations.

- **Howard Brown Health** is one of the nation's largest LGBT organizations providing health care to more than 30,000 adults and youth in Chicago. It exists to eliminate the disparities in health care experienced by lesbian, gay, bisexual and transgender people through research, education and the provision of services promoting health and wellness.
- **Legacy Community Health Services, Inc**. is a Houston-based full-service Federally Qualified Health Center that identifies unmet needs and gaps in health-related services and develops client-centered programs to address those needs. It provides a wide range of health services, including comprehensive HIV/AIDS care.
- **The National LGBTQ Task Force** is the nation's oldest national LGBTQ advocacy group. The Task Force builds power, takes action, and creates change to achieve freedom and justice for LGBTQ people and their families. As a progressive social-justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equality for all. The Task Force trains and mobilizes millions of activists across the nation to combat discrimination against LGBTQ people in every aspect of their lives: housing, employment, health care, retirement, and basic human rights.

Proposed *Amici* submit this brief to assist the Court's understanding of how the Final Rule fortifies the barriers sexual and gender minorities face when accessing health care thereby harming their health, putting LGBT cancer patients at increased risk of premature death, and hurting the well-being of LGBT patients, their families and communities.

"The court retains broad discretion to either permit or reject the appearance of

amicus curiae." *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987). The privilege of being heard as *amicus* rests in the discretion of the court which may grant or refuse leave to the extent it deems the proffered information timely, useful or otherwise. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). "District courts frequently welcome amicus briefs from non-parties if the amicus has unique information or perspective that can help the court beyond the help that the lawyers from the parties are able to provide." *Sonoma Falls Developers, L.L.C. v. Nev. Gold & Casinos, Inc.*, 272 F.Supp. 2d 919, 925 (N.D. Cal. 2003); *see also Am. Trucking Assocs., Inc. v. City of Los Angeles*, CV 08-04920 CAS(CTX), 2008 WL 4381644, at *2 (C.D. Cal. Sept. 4, 2008) (granting leave where "RF's amicus brief may be of assistance to the Court in the determination of the substantive issues in this case."). In addition, participation of amicus curiae may be appropriate where legal issues in a case have potential ramifications beyond the parties directly involved. *Id.*

WHEREFORE, Proposed *Amici* respectfully request leave to file the annexed brief as *amicus curiae*.

Dated: September 12, 2019

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: _____
Susan Baker Manning

Susan Baker Manning, Bar No. 197350
Geraldine E. Edens
(*pro hac vice* application pending)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: +1.202.739.3000
Facsimile: +1.202.739.3001
susan.manning@morganlewis.com
geri.edens@morganlewis.com

Susan Feign Harris
(*pro hac vice* application pending)
MORGAN LEWIS & BOCKIUS LLP
1000 Louisiana Street
Houston, TX 77002-5005
Telephone: +1.713.890.5000
Facsimile: +1.713.890.5001
susan.harris@morganlewis.com

Attorneys for *Amicus Curiae*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, et al.,

Defendants.

Case Nos. 3:19-cv-2405-WHA
3:19-cv-2769-WHA
3:19-cv-2916-WHA

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

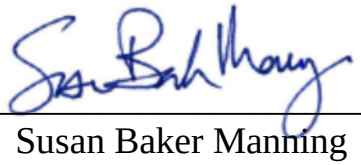
I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 1111 Pennsylvania Avenue, NW, Washington, DC 20004.

I am not a party to the above-entitled action. I have caused service of this Notice of Motion and Unopposed Motion To File Brief As *Amici Curiae* on all parties of record by electronically filing the foregoing with the Clerk of the District Court

using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the following is true and correct.

Dated: September 12, 2019.



Susan Baker Manning

Geraldine Edens*
Susan Baker Manning, Cal. Bar No. 197350
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: +1.202.739.3000
Facsimile: +1.202.739.3001
geri.edens@morganlewis.com
susan.manning@morganlewis.com

Susan Feign Harris*
MORGAN LEWIS & BOCKIUS LLP
1000 Louisiana Street
Houston, TX 77002-5005
Telephone: +1.713.890.5000
Facsimile: +1.713.890.5001
susan.harris@morganlewis.com

* *Pro hac vice* application pending

Attorneys for Amici Curiae

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, et al.,

Defendants.

Case Nos. 3:19-cv-2405-WHA
3:19-cv-2769-WHA
3:19-cv-2916-WHA

BRIEF OF HEALTH CARE PROVIDERS AND HEALTH CARE ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Honorable William H. Alsup
Date: October 30, 2019
Time: 8 a.m.

TABLE OF CONTENTS

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
WASHINGTON, D.C.

TABLE OF AUTHORITIES

Page(s)

Health care providers and health care advocacy organizations, the National LGBT Cancer Network, Callen Lorde Community Health Center, Care Resource Community Health Centers, Inc., Howard Brown Health, Legacy Community Health Services, Inc., and the National LGBT Task Force respectfully submit this brief as *amici curiae* in support of Plaintiffs' motions for summary judgment seeking to vacate and set aside the Department of Health and Human Services' ("HHS" or the "Department") final rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) ("Final Rule").

INTERESTS OF *AMICI CURIAE*

The following organizations are health care providers and advocates for the delivery of preventive, curative, and palliative cancer care to LGBT individuals to improve their lives. *Amici* submit this brief to assist the Court's understanding of how the Final Rule fortifies the barriers sexual and gender minorities face when accessing health care thereby harming their health, putting LGBT cancer patients at increased risk of premature death, and hurting the well-being of LGBT patients, their families and communities.

- **The National LGBT Cancer Network** is a New York-based nonprofit organization that works to improve the lives of LGBT cancer survivors and those at risk for cancer through education, training of health care providers, and advocating for LGBT survivors in mainstream cancer organizations, the media, and research. LGBT Americans already face discrimination in the health care system—a problem that is particularly acute for transgender people. As part of its mission, the Cancer Network is intimately familiar with the body of research establishing that LGBT individuals are disproportionately affected by cancer and other serious illnesses and face significant barriers to accessing quality health care.
- **Callen-Lorde Community Health Center** provides sensitive, quality health care and related services to New York's LGBT communities regardless of ability to pay. To further its mission, Callen-Lorde promotes health education and wellness, and advocates for LGBTQ health issues.

- **Care Resource Community Health Centers, Inc**. is a nonprofit and Federally Qualified Health Center with four locations in South Florida. It provides comprehensive health and support services to address the health care needs of pediatric, adolescent, and adult populations.
- **Howard Brown Health** is one of the nation's largest LGBT organizations providing health care to more than 30,000 adults and youth in Chicago. It exists to eliminate the disparities in health care experienced by lesbian, gay, bisexual and transgender people through research, education and the provision of services promoting health and wellness.
- **Legacy Community Health Services, Inc**. is a Houston-based full-service Federally Qualified Health Center that identifies unmet needs and gaps in health-related services and develops client-centered programs to address those needs. It provides a wide range of health services, including comprehensive HIV/AIDS care.
- **The National LGBT Task Force's** mission is to advance full freedom, justice, and equality for LGBTQ people. It works to educate lawmakers and others about the harms caused to the LGBTQ community when facing discrimination.

INTRODUCTION AND BACKGROUND

A cancer diagnosis is a devastating and life-altering experience for any individual, but for LGBT Americans, it disproportionately puts their lives at risk. The American Cancer Society estimates that in 2019 there will be 130,000 new cancer cases and 45,000 cancer deaths in LGBT patients.[1] Not only does research confirm that the LGBT community faces a higher cancer burden than the general population, but numerous studies show that LGBT individuals face significant barriers to accessing the health care system, including refusal of care due to, among other things, health care providers' implicit or explicit bias and/or ignorance of LGBT patients' unique needs. HHS "does not dispute that people [in various demographic groups, including LGBT people] face

[1] American Cancer Society, *Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) People with Cancer Fact Sheet* (Sept. 4, 2019), https://www.cancer.org/content/dam/cancer-org/cancer-control/en/booklets-flyers/lgbtq-people-with-cancer-fact-sheet.pdf.

health care disparities" and it acknowledges that "different types of harm can result from denial of a particular procedure based on an exercise of [a religious or moral] belief or conviction." 84 Fed. Reg. at 23,251. Yet despite clear empirical evidence and warnings from leading health care organizations, when promulgating the Final Rule, HHS unreasonably and arbitrarily dismissed any connection between the Final Rule and the worsening of the already-significant barriers to health care experienced by many in the LGBT community. HHS justified its rejection of any relationship between the Final Rule and increased barriers to health care, asserting that there is "no empirical data on how . . . protect[ion] of conscience rights have affected access to care or health outcomes."[2] *Id.* Common sense, however, dictates that any increase in refusals of care increases barriers to care. This, in turn, affects patient health. Such increased barriers can be life threatening and prevent patients from obtaining essential cancer prevention and treatment.

ARGUMENT

I. THE LGBT COMMUNITY BEARS A DISPROPORTIONATE CANCER BURDEN

The American Cancer Society, the American Society of Clinical Oncology, and other notable medical organizations report that LGBT individuals bear a disproportionate cancer burden because of their unique cancer risks, needs, and challenges, including health care discrimination.[3] In a seminal study, the Institute of Medicine examined existing research addressing the health status of LGBT populations in three life stages: childhood and adolescence, early/middle adulthood, and later adulthood.[4] Among many other findings, the IOM Study found that lesbians and bisexual

[2] HHS cites two studies to support its position that there is an absence of data on the connection between conscientious objection and access to care. 84 Fed. Reg. at 23,251, n.345. However, those studies actually show that conscience-based refusals are barriers to health care access. For example, while one study notes that data on both the prevalence of conscience-based refusal of care and the consequences to women's health are inadequate, "they indicate that refusal is unevenly distributed; that it may have the most severe impact in those parts of the world least able to sustain further personnel shortages; and that it also affects women in more privileged circumstances." Wendy Chavkin, *et al.*, *Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences, and Policy Responses*, 123 INT'L J. GYNECOL. & OBSTET. 3 (2013).

[3] *See e.g.*, American Cancer Society, *supra* note 1.

[4] Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*, (The National Academies Press 2011), *hereinafter* "IOM

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
WASHINGTON, D.C.

women may be at greater risk of obesity, which increases their risk for breast and other cancers; lesbians may be at higher risk for breast cancer due to a higher prevalence of multiple risk factors; men who have sex with men have a greater risk of anal cancer; transgender men on testosterone therapy may be at increased risk for ovarian cancer; prostate cancer has been reported among transgender women taking feminizing hormones; and LGBT individuals are more likely to smoke cigarettes than their heterosexual counterparts, putting them at higher risk for tobacco-related cancers.[5] Compounding these risks, LGBT individuals participate at lower levels in traditional cancer screening programs due, in part, to lack of insurance coverage and to previous experiences of discrimination when interacting with the health care system.[6] Consequently, LGBT individuals are more likely to present with late-stage cancer diagnoses when discovered, leading to poorer health outcomes overall.[7]

Study." The National Academy of Sciences (the "Academy") was chartered by Congress in 1863 to advise the federal government on scientific and technology issues. In 1970, the Academy established the Institute of Medicine as an independent, non-governmental, nonprofit organization with a mandate to provide the government and others with advice, counsel, and independent research on major topics in health care. IOM studies are widely considered unbiased and authoritative.

[5] IOM Study, *supra* note 4 at 205-216. The IOM Study was cited in over 40 comments submitted to HHS during the public comment period on the proposed rule, including comments submitted by the American Nurses Association and American Academy of Nursing, the California LGBT Health and Human Services Network, the Center for Medicare Advocacy, the Center on Halsted, the Colorado Consumer Health Initiative, the Commonwealth of Pennsylvania Departments of Aging, Health, Human Services, Drug and Alcohol Programs, and Insurance, Empire Justice Center, FreeState Justice, Georgia Equality, Georgians for a Healthy Future; GLMA: Health Professionals Advancing LGBT Equality, the HIV Medicine Association, International Women's Health Coalition, Jackson County Democrats (JCD) LGBTQ Caucus, Kentucky Voices for Health, Lambda Legal, the Mazzoni Center, the Montana Coalition Against Domestic & Sexual Violence, Montana Women Vote, the National Center for Lesbian Rights, the National Coalition for LGBT Health, the National Latina Institute for Reproductive Health, the National LGBT Chamber of Commerce, the National LGBTQ Task Force, Our Family Coalition, People for the American Way, the Southern Arizona Gender Alliance, The Alliance: State Advocates for Women's Rights & Gender Equality, the Colorado Children's Campaign, the County of Santa Clara, California, the Fenway Institute, the Movement Advancement Project, the National Health Law Program, the PROMO Fund, The Trevor Project, the Williams Institute, the Transgender Law Center, and Young Invincible.

[6] Jennifer Griggs, et al., *American Society of Clinical Oncology Position Statement: Strategies for Reducing Cancer Health Disparities Among Sexual and Gender Minority Populations*, 35 J. CLINICAL ONCOLOGY 2203 (2017).

[7] *Id.*

In a recent review, seven types of cancers were identified that may disproportionately affect the LGBT population: anal, breast, cervical, colorectal, endometrial, lung, and prostate cancers. [8] For example, anal cancers are relatively rare, but gay and bisexual men are at a much higher risk of developing these cancers, especially those who are HIV-positive.[9] Excluding skin cancers, breast cancer is the most frequently diagnosed cancer in women.[10] The IOM Study reports that lesbian and bisexual women have a higher risk of breast cancer because of a higher prevalence of risk factors such as nulliparity, alcohol use, smoking, and obesity.[11] Studies also show that lesbian cancer survivors are twice as likely to report only fair or poor health compared to heterosexual women.[12] Moreover, studies have shown that the relationship between the health care provider and patient is crucial to the decision to obtain breast cancer screening and that lesbian and bisexual women often do not have positive relationships with their providers.[13]

Lung cancer is the second most common cancer and the leading cause of death in the United States and around the world. The American Cancer Society estimates that there will be 288,150 new cases of lung cancer in the U.S., and 142,670 deaths, in 2019.[14] Cigarette smoking is the most important and prevalent risk factor for lung cancer. Because LGBT individuals are 1.5 to 2.5 times more likely than the general population to smoke cigarettes,[15] they face a far greater risk of tobacco-

---

[8] Gwendolyn Quinn, et al., *Cancer and Lesbian, Gay, Bisexual, Transgender/Transsexual and Queer/Questioning (LGBTQ) Populations*, 65 CA: CANCER J. FOR CLINICIANS 384 (2015).

[9] *Id.*

[10] *Id.* (citations omitted).

[11] IOM Study, *supra* note 4 at 205.

[12] Ulrike Boehmer, et al., *Cancer Survivorship and Sexual Orientation*, 117 CANCER 3796 (2011).

[13] Stacey L. Hart, and Deborah J. Bowen, *Sexual Orientation and Intentions to Obtain Breast Cancer Screening*, 18 J. WOMEN'S HEALTH 177 (2009); M. K. Hutchinson, et al., *Multisystem Factors Contributing to Disparities in Preventive Health Care Among Lesbian Women*, 35 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 393 (2006).

[14] American Cancer Society, *Cancer Facts & Figures 2019*, https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2019/cancer-facts-and-figures-2019.pdf.

[15] J. G., Lee, et al., *Tobacco Use Among Sexual Minorities in the USA, 1987 to May 2007: A Systematic Review*, 18 TOBACCO CONTROL 275 (2009).

related cancers, including lung cancer. Studies also show that the incidence of lung cancer among HIV-infected patients is significantly higher than the general population.[16] The empirical evidence validates the disparities in cancer risk and prevalence among LGBT individuals, underscoring the critical needs of this population for access to quality health care.

II. LGBT INDIVIDUALS FACE SIGNIFICANT BARRIERS TO CANCER CARE

The LGBT community faces significant barriers to accessing preventative, curative, and palliative cancer care.[17] Barriers include discrimination experienced by the health care providers, fear of discrimination, and poor patient-provider interactions. The Final Rule's expansive definitions of the impacted activities and the range of health care institutions and individuals who may refuse care under existing laws will undoubtedly lead to increased refusals of care to LGBT cancer patients, which can only lead to poor cancer health outcomes. HHS failed to consider the potential for the Final Rule to create a discriminatory shield that allows health care providers to refuse LGBT individuals needed health care because of objections to their behavior.

The Institute of Medicine defines access to health care as the "timely use of personal health services to achieve the best possible outcomes."[18] HHS further defines access to care by three factors: "(1) gaining entry into the health care system (usually through insurance coverage); (2) accessing a location where needed health care services are provided; and (3) finding a health care provider whom the patient trusts."[19] Studies establish that there are significant barriers under each HHS factor for LGBT individuals to obtain needed health care. While this brief focuses principally on the second and third HHS factors, it is important to note that studies consistently demonstrate that LGBT individuals are more likely than average to have low socioeconomic status and lack

---

[16] Wenli Hou, et al., *Incidence and Risk of Lung Cancer in HIV-Infected Patients*, 139 J. CANCER RESEARCH AND CLINICAL ONCOLOGY 1781 (2013).

[17] Ulrike Boehmer, et al., *Cancer Survivors Access to Care and Quality of Life: Do Sexual Minorities Fare Worse than Heterosexuals*?, 125 CANCER 3079 (2019).

[18] Institute of Medicine, *Access to Health Care in America,* 4 (National Academies Press 1993).

[19] U.S. Dept. of Health and Human Services, Office of Disease Prevention and Health Promotion, *Access to Health Services*, HealthyPeople 2020, https://www.healthypeople.gov/2020/topics-objectives/topic/Access-to-Health-Services#1.

health insurance, factors that often lead individuals to postpone or avoid needed preventative or curative care.[20] For those who can afford health care, the administrative record illustrates that LGBT individuals are often unwelcome and misunderstood by the health care system.

A. Discrimination and Fear of Discrimination by Health Care Providers Are Key Barriers to Health Care for LGBT Individuals

Discrimination against LGBT individuals in health care settings is well-documented. The IOM Study examined barriers to LGBT health care at personal and structural levels. Personal level barriers to care evolve from enacted, felt, or internalized stigma.[21] Enacted stigma refers to explicit discriminatory behaviors. As the IOM Study finds, there are many examples of manifestations of enacted stigma against LGBT individuals by health care providers, including refusal of treatment by health care staff, verbal abuse, and disrespectful behavior, as well as many other forms of failure to provide adequate care.[22] The administrative record contains numerous comments by notable organizations informing HHS of LGBT individuals' personal experiences of enacted stigma by health care providers. A number of commenters highlighted particular experiences of discrimination, such as a transgender individual being refused treatment when brought to the hospital by ambulance with broken bones and wounds and a pediatrician refusing to treat the newborn baby of a lesbian couple.[23]

---

[20] Ulrike Boehmer, et al., *LGBT Populations' Barriers to Cancer Care*, 34 SEMINARS IN ONCOLOGY NURSING 21 (2017) (noting "Studies are consistently pointing to LGBT's low socio-economic state and lack of health insurance… a recent representative study indicated that 41% of LGBT people have incomes at or below 139% of the federal poverty level.").

[21] IOM Study, *supra* note 4 at 63-64.

[22] *Id.* at 62 (citing Michele J. Eliason and Robert Schope, R., *Does "Don't Ask Don't Tell" Apply to Health Care? Lesbian, Gay, and Bisexual People's Disclosure to Health Care Providers*, 5 J. OF GAY AND LESBIAN MEDICAL ASSOCIATION 125 (2001)).

[23] *See,e.g.*, Comment submitted by County of Santa Clara, California, March 27, 2018, HHS-OCR-2018-0002-54930; Comment submitted by the National Center for Transgender Equality, March 29, 2018, HHS-OCR-2018-0002-69988.

Lambda Legal conducted a survey of some 5,000 LGBT individuals to examine refusals of care and other barriers to health care for LGBT individuals.[24] More than one-half of the respondents reported experiencing some type of overt discrimination, including health care providers refusing to touch them, using harsh or abusive language, being physically rough or abusive, and blaming them for their health status. Moreover, almost 8 percent of LGBT respondents reported that they had been denied needed health care outright.[25]

Similarly, the Center for American Progress surveyed 1,864 individuals about their experiences with health insurance and health care and found that 29 percent of transgender individuals were refused care because of their actual or perceived gender identity, 12 percent were refused health care related to gender transition, 21 percent reported that a doctor or other health care provider used harsh or abusive language when treating them, and 29 percent reported unwanted physical contact from a doctor or other health care provider (such as fondling, sexual assault, or rape).[26] In another national survey, 19 percent of transgender individuals reported they were refused care due to their gender non-conforming status.[27] HHS arbitrarily dismissed this and other information as anecdotal and not helpful to estimate the degree to which discrimination is attributable to the exercise of religious beliefs or moral convictions. 84 Fed. Reg. at 23,251-52.

With regard to "felt stigma," the IOM Study explains that the fear of being perceived as gay, lesbian, or bisexual can lead individuals to modify or adapt their behavior in an effort to reduce

---

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

[25] *Id.*

[26] Shabab Ahmed Mirza and Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Center for Am. Progress (2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/. Among the respondents, 857 identified as lesbian, gay, bisexual, and/or transgender, queer, or asexual, while 1,007 identified as heterosexual and cisgender/nontransgender. Respondents were from all income ranges and were diverse across factors such as race, ethnicity, education, geography, disability status, and age.

[27] Jaime M. Grant, et al., *National Transgender Discrimination Survey Report on Health and Health Care*, Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force (2010), https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf.

the likelihood of discrimination.[28] For example, many LGBT individuals do not disclose their sexual orientation because of fear of discrimination.[29] In rural settings, where health care is less available, many LGBT individuals remain strategically silent,[30] which can have significant implications for preventative cancer screening.[31] For example, if a health care provider does not know that a person is gay, they may not be referred for anal cancer screening. Felt stigma has associated costs. LGBT individuals' fear of stigmatization and previous negative health care experiences are significant barriers to health care access that cause LGBT people to often delay seeking care or conceal their sexual orientation in an effort to avoid provider bias.[32]

In one of the largest national surveys of transgender discrimination in health care in the U.S., researchers found that 28 percent of respondents reported postponing needed medical care because of fear of discrimination.[33] Similarly, a 2015 survey found that 23 percent of transgender respondents did not seek health care for fear of being disrespected or mistreated, with transgender men more likely to avoid care.[34] A recent National Institutes of Health-funded study concluded that there was a significant association between the fear of discrimination and the physical and mental health of transgender adults.[35] Fear of discrimination was significantly associated with poor

---

[28] IOM Study, *supra* note 4 at 63.

[29] Laura E. Durso and Ilan H. Meyer, *Patterns and Predictors of Disclosure of Sexual Orientation to Healthcare Providers Among Lesbians, Gay Men, and Bisexuals*, 10 SEXUALITY RESEARCH AND SOCIAL POLICY 35 (2013).

[30] IOM Study, *supra* note 4 at 63 (citations omitted).

[31] Dani E. Rosenkrantz, et al., *Health and Health Care of Rural Sexual and Gender Minorities: A Systematic Review* 2 AM. PSYCHOLOGICAL ASS'N J. STIGMA AND HEALTH 229 (2017).

[32] *Id.*

[33] Grant, et al., *supra* note 27.

[34] Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, (Nat'l Ctr. for Transgender Equality 2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

[35] Kristie L. Seelman, et.al, *Transgender Noninclusive Healthcare and Delaying Care Because of Fear: Connections to General Health and Mental Health Among Transgender Adults*, TRANSGENDER HEALTH, Vol. 2.1 (2017) ("The multivariate findings unequivocally supported our second hypothesis that there was significant association between delaying needed health care in the past year because of fear of discrimination and worse general health and mental health (current depression, suicidal ideation, and suicide attempts.").

mental health in the form of depression, suicidal ideation, and suicide attempts.[36] Thus, patients that may have the greatest need for care do not seek it out of fear. The Final Rule will only exacerbate such problems.

"Internalized stigma" is exhibited as prejudice against sexual minorities (homophobia) and transgender individuals (transphobia).[37] Health care providers' biases create barriers to needed care, which are most problematic in rural settings where health care options are limited. In a study of 4,221 heterosexual first-year medical students, researchers found that nearly one-half (45.79 percent) of respondents expressed some form of explicit bias against gay and lesbian individuals, and most (81.51 percent) showed implicit bias.[38] Another study showed that heterosexual providers show an implicit preference for heterosexual patients over LGBT patients.[39] In a study conducted over six years, researchers found that medical students exposed to negative role modeling expressed more bias against sexual minorities. [40] Finally, a study of health professions students in Georgia found that religiosity was associated with negative attitudes towards LGBT individuals.[41]

Evidence confirms the reality that LGBT individuals experience stigma and discrimination within the health care system including cancer screening and end-of-life care.[42] The Final Rule

---

[36] *Id.*

[37] IOM Study, *supra* note 4 at 63.

[38] Sara E. Burke, et al., *Do Contact and Empathy Mitigate Against Gay and Lesbian People Among Heterosexual Medical Students? A Report from Medical Student CHANGES Study*, 90 ACAD. MED. 645 (May 2015).

[39] Janice A. Sabin, et al., *Health Care Providers' Implicit and Explicit Attitudes Toward Lesbian and Gay Men*, 105 AM. J. PUB. HEALTH 1831 (2015).

[40] Diana J. Burgess, et al., *Incoming Medical Students' Political Orientation Affects Outcomes Related to Care of Marginalized Groups: Results From the Medical Student CHANGES Study*, 44 J. HEALTH POL., POL'Y & L. 113 (2019). The study also found that increased socialization with LGBT individuals during medical school and training directly affected negative comments and actions against sexual minorities, decreasing bias.

[41] Christina K. Wilson, et al., *Attitudes Toward LGBT Patients Among Students in the Health Professions: Influence of Demographics and Discipline*, 1 LGBT HEALTH 204 (July 30, 2014).

[42] Jack E. Burkhalter, et al., *The National LGBT Cancer Action Plan: A White Paper of the 2014 National Summit on Cancer in the LGBT Communities*, 3 LGBT HEALTH 19 (Jan. 27, 2016) (summarizing recommendations from a 2014 summit focused on improving health outcomes targeting cancer in the LGBT community and overcoming discrimination and gender bias).

dismisses the overwhelming evidence of discrimination, including discrimination based on religiosity, in the health care system, asserting instead that the studies presented are only "general in nature" and not directly linked to the lawful exercise of religious beliefs. 84 Fed. Reg. at 23,252. Rather than carefully weighing the evidence before it and considering how the Final Rule could be used as a shield for discrimination against LGBT individuals, HHS called for empirical proof that discrimination against LGBT individuals in the health care system is attributable to the exercise of religious beliefs or moral convictions. *Id.* Yet, HHS largely justifies the Final Rule on anecdotal accounts and polling information from health care providers' reported experiences in exercising their religious and moral convictions. *See, e.g., id.* at 23,215.

B. HHS Ignored Numerous Warnings by Notable Organizations that the Final Rule Will Harm LGBT Individuals

HHS received numerous comments from notable organizations informing the agency of the significant barriers LGBT individuals face in accessing the health care system. For example, the Association of American Medical Colleges ("AAMC") warned that the rule would further "exacerbate health care disparities" for LGBT communities as they already "experience discrimination in health care setting, erecting a barrier to accessing health care services."[43] AAMC explained that the rule would "codify" what many within the LGBT community will view as "state-sanctioned discrimination" and "allow providers to refuse care or appropriate referrals solely on the basis of their patients' sexual orientation or gender identity."[44] The American Medical Association emphasized its concern that the rule "legitimize[s] discrimination against vulnerable patients."[45] Similarly, the American Psychiatric Association warned that the rule "may condone or permit discrimination against entire classes of vulnerable populations resulting in reduced access

[43] Association of American Medical Colleges, Comment Letter on Protecting Statutory Conscience Rights (March 29, 2018), HHS-OCR-2018-0002-67592 (citing Sean Cahill, *LGBT Experiences with Health Care*, 36 HEALTH AFFAIRS (Apr. 2017), https://healthaffairs.org/doi/full/10.1377/hlthaff.2017.0277).

[44] *Id.*

[45] American Medical Association, Comment Letter on Protecting Statutory Conscience Rights (March 29, 2018), HHS-OCR-2018-0002-70564.

to health services."[46] The American Academy of Pediatrics urged HHS to consider the particular vulnerability of LGBT youth warning, "policies that single-out or discriminate against LGBT youth are harmful to social-emotional health and may have life-long consequences."[47] A number of commenters cited medical ethical rules to "do no harm," concluding that the Final Rule would fly in the face of medical ethical guidelines that require providers to further both the availability of health care and inclusive and safe environments free of implicit and explicit bias.[48]

HHS dismissed these warnings altogether asserting that, "no comments attempted a detailed description of the actual impact expected from the rule on access to care, health outcomes, and associated concerns." 84 Fed. Reg. at 23,252. Moreover, without justification, the agency concluded that "any decreases in access to care" will be "outweighed by significant overall increases in access generated by this rule." *Id.* HHS speculates that, absent the Final Rule, providers "may limit, or leave their practices" and thus rationalizes that the "burden of not being able to receive any health care clearly outweighs the burden of not being able to receive a particular treatment." *Id.* For many LGBT cancer patients, the inability to receive treatment *is* the inability to receive any health care.

As is the case here, where an agency makes no serious effort to engage with the data and comments presented to it, the agency action must be invalidated. *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 148 (S.D.N.Y. 2019) ("Neither the record nor the text of the

---

[46] American Psychiatric Association, Comment Letter on Protecting Statutory Conscience Rights (March 29, 2018), HHS-OCR-2018-0002-71132 (citing Jennifer Kates, et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, (Henry J Kaiser Family Foundation, May 2018), https://www.kff.org/disparities-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s/).

[47] American Academy of Pediatrics, Comment Letter on Protecting Statutory Conscience Rights (March 29, 2018), HHS-OCR-2018-0002-71022.

[48] Lambda Legal, Comment Letter on Protecting Statutory Conscience Rights (March 29, 2018), HHS-OCR-2018-0002-72186 (citing the Tennessee Counseling Association's formal statement relating to religious exemptions) ("When we choose health care as a profession, we choose to treat all people who need help, not just the one who have goals and values that mirror our own."); *see also* Emma Green, *When Doctors Refuse to Treat LGBT Patients*, THE ATLANTIC, Apr. 19, 2016, https://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapistsmississippi-tennessee/478797/.

Delay Rule reveals any effort to engage with these arguments by DOE, or to conclude that they need not be analyzed."). Similarly, where an agency's cursory explanation "is simply not supported by the record," it must be invalidated. *Id.* (citing *County of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999)); *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (action arbitrary and capricious where agency "offered an explanation for its decision that runs counter to the evidence before the agency").

CONCLUSION

LGBT individuals are vulnerable to health disparities, chief among them the incidence of cancer. As notable health care organizations have warned, the Final Rule promises to exacerbate the existing biases in the health care system against the LGBT population and worse the outcomes for LGBT cancer patients. HHS discounted a plethora of studies documenting the stigma experienced by LGBT individuals in the health care system, as well as empirical data supporting the higher cancer risk LGBT individuals face. As health care providers and organizations dedicated to improving the lives of LGBT cancer survivors and those at risk for cancer, we ask the Court to consider, as HHS failed to do, the data presented in the administrative record and the importance of assuring all populations equal access to critical health care services in our nation. We respectfully suggest that the Court grant Plaintiffs' Motion for Summary Judgment and set aside the Final Rule.

Dated: September 12 , 2019

MORGAN, LEWIS & BOCKIUS LLP

By _____
Susan Baker Manning

Attorneys for Amici Curiae

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, et al.,

Defendants.

Case Nos. 3:19-cv-2405-WHA (lead)
3:19-cv-2769-WHA
3:19-cv-2916-WHA

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Before the Court is the Unopposed Motion To File Brief As *Amici Curiae* filed by proposed *amici* The National LGBT Cancer Network, Callen Lorde Community Health Center, Care Resource Community Health Centers, Inc., Howard Brown Health, Legacy Community Health Services, Inc., and the National LGBTQ Task Force. All Plaintiffs and Defendants have consented to the motion.

After considering the papers and for good cause shown, the Motion is GRANTED.

IT IS SO ORDERED.

Dated: _____

_____
Hon. William H. Alsup
United States District Judge