

1 Susan Baker Manning, Bar No. 197350  
2 Geraldine E. Edens  
3 (*pro hac vice* application pending)  
4 MORGAN, LEWIS & BOCKIUS LLP  
5 1111 Pennsylvania Avenue, NW  
6 Washington, DC 20004  
7 Telephone: +1.202.739.3000  
8 Facsimile: +1.202.739.3001  
9 susan.manning@morganlewis.com  
10 geri.edens@morganlewis.com

11 Susan Feign Harris  
12 (*pro hac vice* application pending)  
13 MORGAN LEWIS & BOCKIUS LLP  
14 1000 Louisiana Street  
15 Houston, TX 77002-5005  
16 Telephone: +1.713.890.5000  
17 Facsimile: +1.713.890.5001  
18 susan.harris@morganlewis.com

19 Attorneys for *Amicus Curiae*

20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 SAN FRANCISCO DIVISION

23 CITY AND COUNTY OF SAN  
24 FRANCISCO,  
25  
26 Plaintiff,  
27  
28 vs.  
29 ALEX M. AZAR II, et al.,  
30 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**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD,  
2 PLEASE TAKE NOTICE THAT the National LGBT Cancer Network, Callen  
3 Lorde Community Health Center, Care Resource Community Health Centers, Inc.,  
4 Howard Brown Health, Legacy Community Health Services, Inc., and the National  
5 LGBTQ Task Force (collectively, “Proposed *Amici*”) hereby move this Court for  
6 leave to file the annexed brief as *amici curiae* in support of Plaintiffs’ motion for  
7 summary judgment. Plaintiffs and for Defendants have consented to the filing of the  
8 *amicus* brief.

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

- 12 • **The National LGBT Cancer Network** is a New York-based nonprofit  
13 organization that works to improve the lives of LGBT cancer survivors and  
14 those at risk for cancer through education, training of health care providers,  
15 and advocating for LGBT survivors in mainstream cancer organizations,  
16 the media, and research. LGBT Americans already face discrimination in  
17 the health care system—a problem that is particularly acute for transgender  
18 people. As part of its mission, the Cancer Network is intimately familiar  
19 with the body of research establishing that LGBT individuals are  
20 disproportionately affected by cancer and other serious illnesses and face  
21 significant barriers to accessing quality health care.
- 22 • **Callen-Lorde Community Health Center** provides sensitive, quality  
23 health care and related services to New York’s LGBT communities  
24 regardless of ability to pay. To further its mission, Callen-Lorde promotes  
25 health education and wellness, and advocates for LGBTQ health issues.
- 26 • **Care Resource Community Health Centers, Inc.** is a nonprofit and  
27 Federally Qualified Health Center with four locations in South Florida. It  
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1 provides comprehensive health and support services to address the health  
2 care needs of pediatric, adolescent, and adult populations.

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

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

27 “The court retains broad discretion to either permit or reject the appearance of  
28

1 amicus curiae.” *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir.  
 2 1987). The privilege of being heard as *amicus* rests in the discretion of the court  
 3 which may grant or refuse leave to the extent it deems the proffered information  
 4 timely, useful or otherwise. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982).  
 5 “District courts frequently welcome amicus briefs from non-parties if the amicus has  
 6 unique information or perspective that can help the court beyond the help that the  
 7 lawyers from the parties are able to provide.” *Sonoma Falls Developers, L.L.C. v.*  
 8 *Nev. Gold & Casinos, Inc.*, 272 F.Supp. 2d 919, 925 (N.D. Cal. 2003); *see also Am.*  
 9 *Trucking Assocs., Inc. v. City of Los Angeles*, CV 08-04920 CAS(CTX), 2008 WL  
 10 4381644, at \*2 (C.D. Cal. Sept. 4, 2008) (granting leave where “RF’s amicus brief  
 11 may be of assistance to the Court in the determination of the substantive issues in this  
 12 case.”). In addition, participation of amicus curiae may be appropriate where legal  
 13 issues in a case have potential ramifications beyond the parties directly involved. *Id.*

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

16 Dated: September 12, 2019

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

18  
 19 By: 

20 Susan Baker Manning

1 Susan Baker Manning, Bar No. 197350  
Geraldine E. Edens  
2 (*pro hac vice* application pending)  
MORGAN, LEWIS & BOCKIUS LLP  
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Facsimile: +1.202.739.3001  
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19 ALEX M. AZAR II, et al.,

20 Defendants.

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

**CERTIFICATE OF SERVICE**

21 IT IS HEREBY CERTIFIED THAT:

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

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



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Susan Baker Manning

1 Geraldine Edens\*  
Susan Baker Manning, Cal. Bar No. 197350  
2 MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, NW  
3 Washington, DC 20004  
Telephone: +1.202.739.3000  
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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.

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

### 8 INTERESTS OF *AMICI CURIAE*

9 The following organizations are health care providers and advocates for the delivery of  
 10 preventive, curative, and palliative cancer care to LGBT individuals to improve their lives. *Amici*  
 11 submit this brief to assist the Court’s understanding of how the Final Rule fortifies the barriers  
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11 Qualified Health Center that identifies unmet needs and gaps in health-related services  
12 and develops client-centered programs to address those needs. It provides a wide range  
13 of health services, including comprehensive HIV/AIDS care.
- 14 • **The National LGBT Task Force’s** mission is to advance full freedom, justice, and  
15 equality for LGBTQ people. It works to educate lawmakers and others about the harms  
16 caused to the LGBTQ community when facing discrimination.

## 17 INTRODUCTION AND BACKGROUND

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

26 \_\_\_\_\_  
27 <sup>1</sup> American Cancer Society, *Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) People with*  
28 *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>.

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

## 12 ARGUMENT

### 13 I. THE LGBT COMMUNITY BEARS A DISPROPORTIONATE CANCER 14 BURDEN

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

21 <sup>2</sup> HHS cites two studies to support its position that there is an absence of data on the connection  
 22 between conscientious objection and access to care. 84 Fed. Reg. at 23,251, n.345. However, those  
 23 studies actually show that conscience-based refusals are barriers to health care access. For example,  
 24 while one study notes that data on both the prevalence of conscience-based refusal of care and the  
 25 consequences to women’s health are inadequate, “they indicate that refusal is unevenly distributed;  
 26 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  
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 & OBSTET. 3 (2013).

27 <sup>3</sup> *See e.g.*, American Cancer Society, *supra* note 1.

28 <sup>4</sup> 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

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

12  
 13 Study.” The National Academy of Sciences (the “Academy”) was chartered by Congress in 1863  
 14 to advise the federal government on scientific and technology issues. In 1970, the Academy  
 15 established the Institute of Medicine as an independent, non-governmental, nonprofit organization  
 16 with a mandate to provide the government and others with advice, counsel, and independent  
 17 research on major topics in health care. IOM studies are widely considered unbiased and  
 18 authoritative.

19 <sup>5</sup> IOM Study, *supra* note 4 at 205-216. The IOM Study was cited in over 40 comments submitted  
 20 to HHS during the public comment period on the proposed rule, including comments submitted by  
 21 the American Nurses Association and American Academy of Nursing, the California LGBT Health  
 22 and Human Services Network, the Center for Medicare Advocacy, the Center on Halsted, the  
 23 Colorado Consumer Health Initiative, the Commonwealth of Pennsylvania Departments of Aging,  
 24 Health, Human Services, Drug and Alcohol Programs, and Insurance, Empire Justice Center,  
 25 FreeState Justice, Georgia Equality, Georgians for a Healthy Future; GLMA: Health Professionals  
 26 Advancing LGBT Equality, the HIV Medicine Association, International Women’s Health  
 27 Coalition, Jackson County Democrats (JCD) LGBTQ Caucus, Kentucky Voices for Health,  
 28 Lambda Legal, the Mazzone 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.

<sup>6</sup> 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).

<sup>7</sup> *Id.*

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

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

17 \_\_\_\_\_  
 18 <sup>8</sup> Gwendolyn Quinn, et al., *Cancer and Lesbian, Gay, Bisexual, Transgender/Transsexual and*  
*Queer/Questioning (LGBTQ) Populations*, 65 CA: CANCER J. FOR CLINICIANS 384 (2015).

19 <sup>9</sup> *Id.*

20 <sup>10</sup> *Id.* (citations omitted).

21 <sup>11</sup> IOM Study, *supra* note 4 at 205.

22 <sup>12</sup> Ulrike Boehmer, et al., *Cancer Survivorship and Sexual Orientation*, 117 CANCER 3796 (2011).

23 <sup>13</sup> 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*  
 24 *Factors Contributing to Disparities in Preventive Health Care Among Lesbian Women*, 35  
 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 393 (2006).

25 <sup>14</sup> American Cancer Society, *Cancer Facts & Figures 2019*,  
 26 <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>.

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

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

## 5 **II. LGBT INDIVIDUALS FACE SIGNIFICANT BARRIERS TO CANCER CARE**

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

14 The Institute of Medicine defines access to health care as the “timely use of personal health  
 15 services to achieve the best possible outcomes.”<sup>18</sup> HHS further defines access to care by three  
 16 factors: “(1) gaining entry into the health care system (usually through insurance coverage); (2)  
 17 accessing a location where needed health care services are provided; and (3) finding a health care  
 18 provider whom the patient trusts.”<sup>19</sup> Studies establish that there are significant barriers under each  
 19 HHS factor for LGBT individuals to obtain needed health care. While this brief focuses principally  
 20 on the second and third HHS factors, it is important to note that studies consistently demonstrate  
 21 that LGBT individuals are more likely than average to have low socioeconomic status and lack  
 22

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

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

26 <sup>18</sup> Institute of Medicine, *Access to Health Care in America*, 4 (National Academies Press 1993).

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

1 health insurance, factors that often lead individuals to postpone or avoid needed preventative or  
 2 curative care.<sup>20</sup> For those who can afford health care, the administrative record illustrates that  
 3 LGBT individuals are often unwelcome and misunderstood by the health care system.

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

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

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

26 <sup>21</sup> IOM Study, *supra* note 4 at 63-64.

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

<sup>23</sup> *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.

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

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

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

19 \_\_\_\_\_  
 20 <sup>24</sup> Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination*  
 21 *Against LGBT People and People Living with HIV* (2010), [www.lambdalegal.org/health-care-](http://www.lambdalegal.org/health-care-report)  
 22 [report](http://www.lambdalegal.org/health-care-report).

23 <sup>25</sup> *Id.*

24 <sup>26</sup> Shabab Ahmed Mirza and Caitlin Rooney, *Discrimination Prevents LGBTQ People from*  
 25 *Accessing Health Care*, Center for Am. Progress (2018),  
 26 [https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-](https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/)  
 27 [lgbtq-people-accessing-health-care/](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,  
 28 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.

<sup>27</sup> 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\\_S](https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf)  
[urvey\\_Report\\_on\\_health\\_and\\_health\\_care.pdf](https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf).

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

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

16 <sup>28</sup> IOM Study, *supra* note 4 at 63.

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

19 <sup>30</sup> IOM Study, *supra* note 4 at 63 (citations omitted).

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

22 <sup>32</sup> *Id.*

23 <sup>33</sup> Grant, et al., *supra* note 27.

24 <sup>34</sup> 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>.

25 <sup>35</sup> Kristie L. Seelman, et.al, *Transgender Noninclusive Healthcare and Delaying Care Because of*  
 26 *Fear: Connections to General Health and Mental Health Among Transgender Adults*,  
 TRANSGENDER HEALTH, Vol. 2.1 (2017) (“The multivariate findings unequivocally supported our  
 27 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  
 28 depression, suicidal ideation, and suicide attempts.”).

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

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

14 Evidence confirms the reality that LGBT individuals experience stigma and discrimination  
15 within the health care system including cancer screening and end-of-life care.<sup>42</sup> The Final Rule

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16  
17 <sup>36</sup> *Id.*

18 <sup>37</sup> IOM Study, *supra* note 4 at 63.

19 <sup>38</sup> Sara E. Burke, et al., *Do Contact and Empathy Mitigate Against Gay and Lesbian People Among*  
20 *Heterosexual Medical Students? A Report from Medical Student CHANGES Study*, 90 ACAD. MED.  
21 645 (May 2015).

22 <sup>39</sup> Janice A. Sabin, et al., *Health Care Providers’ Implicit and Explicit Attitudes Toward Lesbian*  
23 *and Gay Men*, 105 AM. J. PUB. HEALTH 1831 (2015).

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

<sup>41</sup> 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).

<sup>42</sup> 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).

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

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

12 HHS received numerous comments from notable organizations informing the agency of the  
 13 significant barriers LGBT individuals face in accessing the health care system. For example, the  
 14 Association of American Medical Colleges (“AAMC”) warned that the rule would further  
 15 “exacerbate health care disparities” for LGBT communities as they already “experience  
 16 discrimination in health care setting, erecting a barrier to accessing health care services.”<sup>43</sup> AAMC  
 17 explained that the rule would “codify” what many within the LGBT community will view as “state-  
 18 sanctioned discrimination” and “allow providers to refuse care or appropriate referrals solely on  
 19 the basis of their patients’ sexual orientation or gender identity.”<sup>44</sup> The American Medical  
 20 Association emphasized its concern that the rule “legitimize[s] discrimination against vulnerable  
 21 patients.”<sup>45</sup> Similarly, the American Psychiatric Association warned that the rule “may condone or  
 22 permit discrimination against entire classes of vulnerable populations resulting in reduced access  
 23

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

28 <sup>44</sup> *Id.*

<sup>45</sup> American Medical Association, Comment Letter on Protecting Statutory Conscience Rights  
 (March 29, 2018), HHS-OCR-2018-0002-70564.

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

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

16 As is the case here, where an agency makes no serious effort to engage with the data and  
17 comments presented to it, the agency action must be invalidated. *Nat. Res. Def. Council v. U.S.*  
18 *Dep’t of Energy*, 362 F. Supp. 3d 126, 148 (S.D.N.Y. 2019) (“Neither the record nor the text of the  
19

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

26 <sup>47</sup> American Academy of Pediatrics, Comment Letter on Protecting Statutory Conscience Rights  
27 (March 29, 2018), HHS-OCR-2018-0002-71022.

28 <sup>48</sup> 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-](https://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapistsmississippi-tennessee/478797/)  
[therapistsmississippi-tennessee/478797/](https://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapistsmississippi-tennessee/478797/).

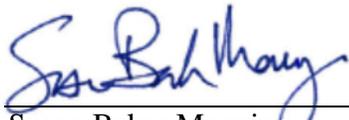
1 Delay Rule reveals any effort to engage with these arguments by DOE, or to conclude that they  
2 need not be analyzed.”). Similarly, where an agency’s cursory explanation “is simply not supported  
3 by the record,” it must be invalidated. *Id.* (citing *County of L.A. v. Shalala*, 192 F.3d 1005,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

7 **CONCLUSION**

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

19 Dated: September 12 , 2019

MORGAN, LEWIS & BOCKIUS LLP

20  
21 By   
22 Susan Baker Manning

*Attorneys for Amici Curiae*

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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