

Nos. 20-15398, 20-15399, 20-16045, and 20-35044

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY AND COUNTY OF SAN FRANCISCO, *Plaintiff-Appellee*,

v.

ALEX M. AZAR II et al., *Defendants-Appellants*.

COUNTY OF SANTA CLARA et al., *Plaintiffs-Appellees*,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, *Plaintiff-Appellee*,

v.

ALEX M. AZAR II et al., *Defendants-Appellants*.

STATE OF WASHINGTON, *Plaintiff-Appellee*,

v.

ALEX M. AZAR II et al., *Defendants-Appellants*.

On Appeal from the United States District Courts
for the Northern District of California and the Eastern District of Washington

**BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN
RIGHTS AND 27 NONPROFIT ORGANIZATIONS IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae National Center for Lesbian Rights, Bay Area Lawyers for Individual Freedom, Callen-Lorde Community Health Center, Center for Constitutional Rights, Empire Justice Center, Equality California, Equality Federation, Family Equality, FORGE, Inc., FreeState Justice, Inc., GLBTQ Legal Advocates & Defenders, Howard Brown Health, Human Rights Campaign, Legacy Community Health Services, Inc., Legal Voice, LGBT Bar Association of New York, Movement Advancement Project, National Center for Transgender Equality, National LGBT Cancer Network, National LGBTQ Task Force, National Trans Bar Association, One Colorado, OutFront Minnesota, QLaw, SAGE, San Francisco LGBT Center, Transgender Law Center, and Transgender Legal Defense and Education Fund, Inc. certify that amici curiae are nonprofit organizations, none of which has a parent corporation, and none of which issues public stock.

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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 in accessing health care: National Center for Lesbian Rights, Bay Area Lawyers for Individual Freedom, Callen-Lorde Community Health Center, Center for Constitutional Rights, Empire Justice Center, Equality California, Equality Federation, Family Equality, FORGE, Inc., FreeState Justice, Inc., GLBTQ Legal Advocates & Defenders, Howard Brown Health, Human Rights Campaign, Legacy Community Health Services, Inc., Legal Voice, LGBT Bar Association of New York, Movement Advancement Project, National Center for Transgender Equality, National LGBT Cancer Network, National LGBTQ Task Force, National Trans Bar Association, One Colorado, OutFront Minnesota, QLaw, SAGE, San Francisco LGBT Center, Transgender Law Center, and Transgender Legal Defense and Education Fund, Inc. Individual statements of each amicus are in the Appendix.

¹ All parties consented to the filing of this brief. 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.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

On May 2, 2019, the Office for Civil Rights within the Department of Health and Human Services (“HHS”) issued a final rule, “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority.” 84 Fed. Reg. 23,170 (May 21, 2019) (“the Final Rule”). Amici, many of whom submitted or joined comments on the proposed rule,² submit this brief to highlight the harm to lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) patients if the Final Rule were to take effect.

The courts below granted summary judgment to Plaintiffs-Appellees and vacated the Final Rule in its entirety. *City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1024-25 (N.D. Cal. 2019) (concluding that the Final Rule was “not in accordance with law” in violation of the Administrative Procedure Act);

² Many Amici submitted or joined comments on the proposed rule. *See* Comment Nos. HHS-OCR-2018-0002-69074 (NCLR); HHS-OCR-2018-0002-69909 (Callen-Lorde Community Health Center); HHS-OCR-2018-0002-71044 (Equality California); HHS-OCR-2018-0002-71892 (Empire Justice Center); HHS-OCR-2018-0002-70389 (Family Equality Council); HHS-OCR-2018-0002-69877 (Forge, Inc.); HHS-OCR-2018-0002-69268 (HIV Health Care Access Work Group, joined by Equality Federation); HHS-OCR-2018-0002-34036 (FreeState Justice, Inc.); HHS-OCR-2018-0002-70446 (GLBTQ Legal Advocates & Defenders); HHS-OCR-2018-0002-68031 (Howard Brown Health); 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-2018-0002-71256 (N.Y. State LGBT Health & Human Services Network, joined by TLDEF and National LGBT Cancer Network); HHS-OCR-2018-0002-58212 (One Colorado Education Fund); HHS-OCR-2018-0002-68429 (SAGE); HHS-OCR-2018-0002-71816 (Transgender Law Center).

Washington v. Azar, 426 F. Supp. 3d 704 (E.D. Wash. 2019) (concluding that HHS exceeded its statutory authority and acted arbitrarily and capriciously in violation of the APA, and that the Final Rule violated the U.S. Constitution’s Spending Clause and separation of powers).³ Among the many defects identified by the district court in *Washington v. Azar* is that HHS failed to consider evidence showing that the Final Rule will “undermine the provision of medical services.” 426 F. Supp. 3d at 721. That, too, made the Final Rule “arbitrary and capricious,” as “HHS disregarded the comments and evidence showing the Rule would severely and disproportionately harm certain vulnerable populations,” including “lesbian, gay, bisexual, and transgender people (LGBT individuals),” among others. *Id.*

As set forth below, HHS failed to consider the harm to LGBTQ patients, who already face significant barriers to health care, including pervasive and harmful discrimination in health care settings. The Final Rule will compound barriers to health care for LGBTQ people, particularly those who are transgender, by inviting health care workers to refuse services or referrals to LGBTQ people. This supports the grant of summary judgment to Plaintiffs-Appellees and vacatur of the Final Rule.

³ The district court in *City and County of San Francisco* did not reach the merits of the constitutional claims, having vacated the Final Rule under the APA. 411 F. Supp. 3d at 1025.

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.”⁴ HHS has an important role in ensuring equal access to health care and ending discriminatory practices contributing to poor health outcomes and health disparities.⁵ 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 discrimination in health care settings. It will invite discrimination and exacerbate the barriers LGBTQ people face in accessing care. The harm to LGBTQ patients, which HHS failed to consider, further supports affirming the grant of summary judgment to Plaintiffs-Appellees and vacatur of the Final Rule.

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

LGBTQ people face barriers to accessing health care, including higher rates

⁴ U.S. Dep’t of Health & Hum. Servs., *About HHS*, <https://perma.cc/7QGL-6C34>.

⁵ See Nat’l Ctr. for Lesbian Rights, Comment Letter on Proposed Rule on Protecting Statutory Conscience Rights in Health Care (Mar. 26, 2018), HHS-OCR-2018-0002-69074, at 2-3 & n.3, 4, <https://perma.cc/B8MQ-XAJM> (discussing HHS’s earlier efforts to reduce discrimination in health care).

of poverty,⁶ unemployment,⁷ and being uninsured⁸ than people who are not LGBTQ. LGBTQ people also experience health disparities,⁹ which are particularly severe for older adults, youth, transgender people, and people of color.¹⁰ As HHS's Healthy People 2020 initiative has recognized, these disparities are "linked to

⁶ See Lourdes Ashley Hunter et al., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All* 4-5, 63-76 (Mar. 2018), <https://perma.cc/8R49-WBLX>; Human Rights Watch, "You Don't Want Second Best": Anti-LGBT Discrimination in US Health Care 17 (2018), <https://perma.cc/256E-4WQG>.

⁷ Rich Bellis, *LGBTQ Workers Still Face Higher Unemployment Rates*, Fast Company (Nov. 8, 2017), <https://perma.cc/9KDX-GKEA>; S.E. James et al., Nat'l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey* 98 (2016), <https://perma.cc/QVN3-LZ74>.

⁸ 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/D4KV-STA2>.

⁹ See, e.g., Inst. of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 1 (2011), <https://perma.cc/X6XF-RZEC> (cited in NCLR Comment, *supra*, at 4 n.8). The National Institutes of Health has designated sexual and gender minorities as a "health disparity population." See Nat'l Insts. of Health, *Director's Message, Sexual and Gender Minorities Formally Designated as a Health Disparity Population for Research Purposes* (Oct. 6, 2016), <https://perma.cc/9BXX-U24K>.

¹⁰ See, e.g., U.S. Dep't of Health & Hum. Servs., *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, <https://perma.cc/K5FF-7DUJ> ("Healthy People 2020") (cited in NCLR Comment, *supra*, at 4 & n.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/YJK7-EL2J>; 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/8AGJ-QE62>; U.S. Ctrs. for Disease Control & Prevention, *HIV and African American Gay and Bisexual Men*, <https://perma.cc/395Y-KA8T>.

societal stigma, discrimination, and denial of their civil and human rights,¹¹ and the “[s]ocial determinants affecting the health of LGBT individuals largely relate to oppression and discrimination.”¹² A recent study documented the negative health impacts of transgender status, sexual orientation, race, and economic factors, which intersect for many people.¹³

Discrimination against LGBTQ people in health care settings is well-documented,¹⁴ particularly with respect to transgender people, who “are often forced to navigate a healthcare system that is resistant at best and at times openly hostile toward transgender people’s needs.”¹⁵ A 2010 study by Lambda Legal found that 56% of lesbian, gay, and bisexual respondents had experienced

¹¹ U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020*, *supra*.

¹² *Id.*; see also U.S. Ctrs. for Disease Control & Prevention, *About LGBT Health*, <https://perma.cc/5Y3M-8G27>.

¹³ Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities in Access to Care*, 36 *Health Affairs* 1786 (2017) (cited in NCLR Comment, *supra*, at 4 & n.12).

¹⁴ See, e.g., NCLR Comment, *supra*, at 4 & n.8 (citing Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for Am. Progress, *Discrimination Prevents LGBTQ People from Accessing Health Care* (Jan. 18, 2018), <https://perma.cc/WA2G-ZRPQ>; 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/M3V7-DQSF>); see also Inst. of Med., *supra*, at 61-67 (discussing barriers LGBT people face in accessing health care) (cited in NCLR Comment, *supra*, at 4 n.8).

¹⁵ 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/A7F8-3AM7>.

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.¹⁶ Seventy percent of transgender and gender non-conforming respondents experienced the same, as had 63% of respondents living with HIV.¹⁷ The study also found that respondents of color and low-income respondents experienced higher rates of discrimination and substandard care.¹⁸ 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 Native American, Black, Middle Eastern, or multiracial.¹⁹ Types of negative experiences included: having to teach the provider about transgender people to get appropriate care, a 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.²⁰

¹⁶ NCLR Comment, *supra*, at 5 & n. 14 (citing Lambda Legal, *When Health Care Isn't Caring*, *supra*, at 5).

¹⁷ Lambda Legal, *When Health Care Isn't Caring*, *supra*, at 10.

¹⁸ *Id.* at 11.

¹⁹ James et al., *supra*, at 96 fig.7.3.

²⁰ *Id.*

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 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.²¹ 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.²² And some denials of care are for medical treatments that are completely unrelated to a 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."²³

²¹ See NCLR Comment, *supra*, at 5 & n 16 (discussing Mirza & Rooney, *supra*).

²² For example, a transgender woman reported that when she asked her long-time doctor for hormone therapy, the doctor 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/AF6K-FLQB>.

²³ 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/S64G-S494>.

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 and were told the pediatrician would not see the infant because of the doctor's religious objections.²⁴ A social worker told Human Rights Watch that a transgender child was accepted for treatment at a religiously affiliated psychiatric practice, but then turned away:

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 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 her child's pediatrician and said, "we've seen you our whole life and our son is gay and we

²⁴ 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/44WZ-8CDX>; Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, Wash. Post (Feb. 19, 2015), <https://perma.cc/6XW9-6VFQ>.

²⁵ Human Rights Watch, "You Don't Want Second Best," *supra*, at 19.

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/CQ3M-PLWB> (study cited in NCLR Comment, *supra*, at 4 n.11.)

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 cancellation of medically necessary, scheduled hysterectomies.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 a comment 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%

²⁷ *Id.* at 22.

²⁸ *Minton v. Dignity Health*, First Am. Compl., No. 17-558259 (Cal. Super. Ct.), <https://perma.cc/5M5U-NNMC>; *Knight v. St. Joseph Health*, Compl., No. DR190259 (Cal. Super. Ct.), <https://perma.cc/YG8A-NN66>; *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 transgender man whose hysterectomy was denied by a Catholic hospital).

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, <https://perma.cc/3ZGH-6DZ4>.

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 hormone injections, and traveling two hours each way to attend therapy or meet with a trans-affirming doctor out of 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 a metropolitan area.³³ For these patients, being turned away by a 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 lesbian in Texas brought her two-year old

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, *supra*, at 6-7 (describing challenges LGBTQ people face in accessing adequate health care in rural communities).

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” 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 (such as fondling, sexual assault, or rape) from a doctor or other health care provider.³⁷ LGBTQ people of color are more vulnerable than white LGBTQ people to discrimination and mistreatment. For example, Lambda Legal’s 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

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/P3M9-NYZB>.

³⁶ *Id.*

³⁷ Mirza & Rooney, *supra*.

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

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 health care provider intentionally refused to acknowledge 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 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 respect transgender patients by deliberately refusing to use their names 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

³⁹ Mirza & Rooney, *supra*.

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

⁴¹ James et al., *supra*, at 96.

Diego because of suicidal thoughts. *See Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090, 1096 (C.D. Cal. 2017). Although hospital staff assured Kyler's mother that Kyler's gender would be respected and that staff would interact with Kyler appropriately, including by referring to him with male pronouns, staff repeatedly addressed and referred to Kyler as a girl. *Id.* (citing complaint). Kyler reported that one employee said, "Honey, I would call you he, but you're such a pretty girl." *Id.* at 1097. "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 health care providers and office staff. The Center for American Progress found that among transgender respondents who visited a 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

⁴² Mirza & Rooney, *supra*.

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 “giggles” and “snickers” from nurses and office staff 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 attention when it is

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.

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 health care 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

As the examples discussed above show, discrimination against LGBTQ people in health settings often results in the denial or delay of care and causes both physical and emotional harms, including poor health outcomes. As UCLA's Williams Institute has explained, "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

⁴⁸ *Id.* at 96.

⁴⁹ *See* Mirza & Rooney, *supra*.

⁵⁰ Seelman et al., *supra*, at 25.

⁵¹ UCLA Williams Inst. Comment, *supra*, at 8-9.

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, HHS’s Healthy People 2020 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, more than two-thirds of respondents to the U.S. Transgender Survey who had been denied medical care because of anti-transgender bias in the past year reported a lifetime suicide attempt.⁵⁵

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-Reported Physical and Mental Health in the United States*, 177 JAMA Internal Med. 1210 (2017), <https://perma.cc/4LCQ-EDJY>.

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

⁵⁴ James et al., *supra*, at 105-07.

⁵⁵ Jody L. Herman et al., UCLA Williams Inst., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey 24* & tbl.13 (Sept. 2019), <https://perma.cc/P8QK-UXLG>.

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 health care workers to refuse services or referrals to LGBTQ people. HHS contemplates that the Rule will result in more health care workers raising 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 failed to adequately consider the costs to patients who will be denied care as a result of the Final Rule, it acknowledged 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 the Final Rule will generate “significant overall increases in access” to health care. *Id.* at 23,252.

HHS’s assumption that the Final Rule will increase access to care also 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 noted above, the district court in *Washington v. Azar* concluded that HHS disregarded the comments and evidence that the Final Rule would “severely and disproportionately

harm” lesbian, gay, bisexual, and transgender people, among other vulnerable populations. 426 F. Supp. 3d at 721. It also found that HHS had “‘internally inconsistent’ treatment of the anecdotal evidence” *Id.* (citation omitted). HHS was “willing[] to rely on anecdotes of bias in the healthcare sector against individuals with religious beliefs and moral convictions,” but “disregard[ed] ‘anecdotal accounts of discrimination from LGBT’ people, citing the lack of suitable data for estimating the impact of the rule.” *Id.* (citing 84 Fed. Reg. at 23,247, 23,251-52). 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.⁵⁶ Gender dysphoria is a serious medical condition: if untreated, it can lead to “clinically significant psychological distress, dysfunction, debilitating depression

⁵⁶ See Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 451-53 (5th ed. 2013).

and, for some people without access to appropriate medical care and treatment, suicidality and death.”⁵⁷ It can, however, “be alleviated through treatment.”⁵⁸

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 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. Mr. Minton alleged that the hospital cancelled his scheduled hysterectomy when it learned Mr. Minton was transgender, although the hospital routinely permits hysterectomies to be performed for patients

⁵⁷ 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/3KQA-Q39T>.

⁵⁸ World Prof. Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 1 (7th Version 2012), <https://perma.cc/5WGR-FKSD>. 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 Prof. 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/CJB3-WULJ>.

who are not transgender.⁵⁹ 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 health care workers – defined extraordinarily broadly to include even a person who schedules procedures,⁶⁰ *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 harmful. As noted above, while denials of any kind of needed medical care can have negative consequences, denial of treatment for gender dysphoria can result in serious harm. As the American Medical Association has recognized, delaying treatment for gender dysphoria “can cause and/or aggravate additional serious and expensive health problems, such as stress-related

⁵⁹ *See Minton v. Dignity Health*, First Am. Compl., *supra*.

⁶⁰ The district court in *City and County of San Francisco* analyzed at length the Final Rule’s “persistent and pronounced redefinition of statutory terms,” 411 F. Supp. 3d 1001, at 1012, concluding that “the new definitions conflict with the underlying statute in significant ways,” *id.* at 1022. For example, under HHS’s interpretation of the Final Rule, “schedulers and housekeeping staff” would be covered under the Church Amendment. *Id.* at 1014.

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 health care 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." *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

⁶¹ Am. Medical Ass'n, *supra*, at 2.

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 discrimination on the basis of sex in health programs or activities receiving federal financial assistance. 42 U.S.C. § 18116(a); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”). Rather than clearly affirming that such discrimination is unlawful, HHS appears to leave open the possibility 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 affirm the district court’s grant of summary judgment to Plaintiffs-Appellees and vacatur of the Final Rule.

Dated: October 20, 2020

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Dated: October 20, 2020

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APPENDIX

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 health care settings and represents LGBTQ people in cases relating to access to health care 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.

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.

Center for Constitutional Rights (CCR) is a national, non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including LGBTQIA+ communities of color impacted by discrimination.

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.

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.

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, Inc. is a 26-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.

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.

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.

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.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a Seattle-based non-profit public interest organization 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 to enact and enforce antidiscrimination laws and to eradicate gender-based discrimination in every area where it is present. Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country.

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 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.

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 national bar association by and for transgender and gender nonconforming (TGNC) legal professionals and law school students and allies who care about transgender rights. NTBA's core mission is to support transgender people in the legal profession and to increase the transgender community's access to affordable and culturally competent legal services. In particular, NTBA strives to secure formal legal protections for TGNC people and meaningfully address issues of equity.

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.

QLaw, the LGBTQ+ Bar Association of Washington, is an association of LGBTQ+ legal professionals and their friends. QLaw serves as a voice of

LGBTQ+ lawyers and other legal professionals in the State of Washington on issues relating to diversity and equality in the legal profession, in the courts, and under the law. QLaw works to educate the public, the legal profession, and the courts about legal issues of particular concern to the LGBTQ+ community.

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.