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August 13, 2019

Alex Azar, U.S. Secretary of Health and Human Services  
Roger Severino, Director of the Office for Civil Rights  
U.S. Department of Health and Human Services (“HHS”)  
Office for Civil Rights  
Attention: Section 1557 NPRM, RIN 0945-AA11  
Hubert H. Humphrey Building, Room 509 F  
200 Independence Avenue S.W.  
Washington, D.C. 20201

**Re: Comment of the Center for Constitutional Rights Regarding  
Nondiscrimination in Health and Health Education Programs and Activities  
(Section 1557 NPRM), RIN 0945-AA11**

Dear Secretary Azar and Mr. Severino,

The Center for Constitutional Rights is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including policies that disproportionately impact LGBTQI communities.

Today we write in our capacity as civil rights leaders to express our grave concern about Section 1557 NPRM, RIN 0945-AA11, “Nondiscrimination in Health and Health Education Programs or Activities”, the rule change to Section 1557 of the Patient Protection and Affordable Care Act (“Section 1557”) recently proposed by HHS (hereinafter the “proposed rule” or “rule”).

The proposed rule undermines Section 1557, the landmark civil rights law prohibiting healthcare discrimination on the basis of race, color, national origin, sex, age, and disability, by carving out a broad set of exclusions that target vulnerable minorities. For example, the proposed HHS rule eliminates vital protections ensuring that transgender people, individuals with limited English proficiency, and people seeking reproductive health services can access health insurance and medical treatment on a fair and equal basis. The proposed HHS rule also weakens Section 1557 by severely restricting its application scope, contrary to Congress’s intent when it adopted the remedial statute.

We respectfully request that HHS reconsider its proposed rule in light of the important objections and considerations articulated below. Specifically, we object to the rule on grounds that it (1) dismantles federal civil rights protections adopted by Congress in a manner that is arbitrary, capricious, and contrary to law; (2) needlessly overturns an existing Section 1557 rule that was implemented after careful consideration by HHS; (3) authorizes discrimination against transgender people and increases the vulnerability and marginalization that they face; (4) disparately impacts immigrant communities and persons with disabilities by rolling back language access protections; (5) impedes the provision of health care to people with HIV/AIDS and other serious medical conditions; (6) unduly burdens the exercise of constitutionally protected reproductive rights; and (7) prevents countless Americans from obtaining life-saving medical treatment and preventative care, as outlined further below.

### **1. The Proposed Rule Dismantles Federal Civil Rights Protections Adopted by Congress in a Manner that is Arbitrary, Capricious, and Contrary to Law**

The Center for Constitutional Rights objects to the proposed rule in the first instance because it dismantles the strong remedial framework that Congress carefully put into place when Section 1557 of the Affordable Care Act was passed and signed into law.

Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in areas ranging from healthcare to insurance by its very text. Yet, the proposed rule seeks to authorize discrimination by insurance providers against all of these groups, and singles out transgender people and persons who have previously accessed reproductive health services for special exclusion, contrary to the intent of Congress as well as established law.

The 2016 Final Rule reiterated that sex stereotyping is a prohibited form of discrimination under the 1989 Supreme Court decision *Price Waterhouse v. Hopkins*.<sup>1</sup> The proposed rule attempts to erase established Supreme Court precedent recognizing that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes. This could result in health providers thinking they could turn a patient away because the patient does not conform with traditional stereotypes about their sex. Federal courts have applied the reasoning of *Price Waterhouse* to both LGBTQI and non-LGBTQI people seeking relief for sex discrimination.<sup>2</sup>

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<sup>1</sup> 490 U.S. 228 (1989).

<sup>2</sup> A majority of the federal courts to recently consider the issue have found that unlawful sex discrimination encompasses discrimination against transgender people. *See, e.g., Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (holding that sex discrimination encompasses discrimination based on sexual orientation); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding that sex discrimination encompasses discrimination against transgender persons); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017) (extending analysis to Title IX of the Educational Amendments); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018) (holding that transgender people are covered by Title VII's prohibition on sex discrimination), *cert. granted*, 139 S.

## Restrictions to Scope

The proposed rule also unjustifiably narrows the scope of Section 1557. As adopted by Congress and signed into law, Section 1557 applies to *any* health program or activity, any part of which is receiving federal financial assistance or under any program or activity that is administered by an Executive Agency or *any* entity established under Title I of the Affordable Care Act. Thus, Section 1557 applies to *all* health programs or activities administered by the Department (as well as other federal Departments) *plus* those established under Title I, and applies to *all* parts of the covered entity, not only the portion receiving federal financial assistance. As written by Congress, Section 1557 also applies to the provision of health insurance which is a “health program or activity” under the statute. Because the proposed rule seeks to amend Section 1557 and limit its application contrary to Congress’s original intent, it is null, void, and should be rescinded by HHS.

### **2. The Proposed Rule Needlessly Overturns an Existing Section 1557 Rule that Was Implemented After Careful Consideration by HHS**

The proposed rule also overturns a prior HHS rule interpreting Section 1557 (hereinafter the “Existing Rule” or “Final Rule”) that was adopted in 2016 after a rigorous notice and comment period where it was carefully vetted by agency personnel and drew broad support of the American public. The Existing Rule was adopted following a significant period of deliberation, including six years of study by HHS, various listening sessions and conferences, two comment periods with approximately 25,000 responses, and an HHS-issued request for information. The new proposed HHS rule comes without comparable consideration and information-gathering, and effectuates a sweeping change to the Affordable Care Act’s legal framework after a mere 120 days of consideration. And instead of promoting clarity or reducing the implementation costs related to the Affordable Care Act, the proposed rule will limit access to healthcare coverage and preventive care in a manner that will increase taxpayer costs over time. The Center for Constitutional Rights opposes the proposed rule for these reasons.

### **3. The Proposed Rule Authorizes Discrimination Against Transgender People and Increases the Vulnerability and Marginalization that LGBTQI People Face**

The Center for Constitutional Rights also objects to the proposed rule because it unconscionably seeks to erase transgender people from Section 1557’s civil rights framework and sanctions discrimination against them.

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Ct. 1599 (Apr. 22, 2019) (No. 18–107). Rescinding the existing rule that incorporates these interpretations would constitute a departure from existing law. Effectuating a rule change at this time is also unwarranted and premature, since the Supreme Court will be providing additional clarity on the scope of sex discrimination protections next term.

The transgender population already suffers significant barriers to healthcare access—one third of respondents surveyed in 2015 had at least one negative experience in a healthcare setting related to being transgender in the year prior to the survey, and nearly one-quarter (23%) of respondents reported that they did not seek the health care they needed in the year prior to completing the survey due to fear of being mistreated as a transgender person.<sup>3</sup> In addition, healthcare options catering to the needs of transgender people were limited: 31 percent of respondents to the U.S. Transgender Survey in 2015 said that it would be “very difficult” or “not possible” to find the same type of service at a different hospital than the one to which they currently go.<sup>4</sup>

By eroding vital protections against healthcare discrimination for transgender people, the proposed rule will exacerbate the poverty, inequality, and marginalization that transgender people face in society. Transgender people generally are more than twice as likely as the U.S. population to be living in poverty, and people of color, including Latinx (43%), American Indian (41%), multiracial (40%), and Black (38%) respondents were more than three times as likely as the U.S. population (12%) to be living in poverty.<sup>5</sup>

Transgender people with disabilities are especially vulnerable under the proposed rule, as many of them rely on healthcare access to live full and authentic lives.<sup>6</sup> Yet, prior to the implementation of the Final Rule in 2016, approximately 42 percent of transgender people with disabilities who were surveyed reported experiencing mistreatment from their health care providers.<sup>7</sup>

Limiting the ability of transgender people to access healthcare services will have broad and sweeping consequences: transgender people already experience elevated rates of extreme poverty, homelessness, and unemployment.<sup>8</sup> Eliminating protections against healthcare discrimination for transgender people will further cement their marginalization and deprive them of the basic means to live, work, and take care of themselves and their families, perpetuating a vicious cycle and further trapping them in poverty.

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<sup>3</sup> See generally Sandy E. James, et al., National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> (hereinafter “2015 U.S. Transgender Survey”).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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

<sup>8</sup> *Id.* at 6, 144 (finding that 21% of people with disabilities, 19% of Black respondents, and 18% of Latino/a respondents reported a household income below \$10,000). See also *id.* at 174 (revealing that 30% of respondents experienced homelessness, and the rate was nearly twice as high among those who lost their job because of their gender identity or expression and transgender women of color).

Accordingly, the Center for Constitutional Rights strenuously opposes the proposed rule and demands that it be withdrawn.

#### **4. The Proposed Rule Disparately Impacts Immigrant Communities and Persons With Disabilities by Rolling Back Language Access Protections**

The Center for Constitutional Rights also objects to proposed rule because it eliminates important language access protections previously established under Section 1557: specifically the requirement of taglines informing members of the public of their right to be free from discrimination and the availability of language assistance, and the provision of language access plans.

By eliminating Section 1557's existing language access protections, the proposed rule will impede the healthcare access of people with disabilities, including blindness and hearing impairments. The Medicare program alone has nearly eight million beneficiaries who are deaf or hard of hearing, and four million beneficiaries who are blind or have low vision—communities who currently rely on HHS's tagline and notice requirements to obtain vital healthcare information.<sup>9</sup>

The proposed rule also disparately impacts immigrant communities whose first language is something other than English. According to U.S. Census data, an estimated 10 million older adults over age 60 speak a language other than English at home, and 6 million speak English less than “very well.” In addition, 66 percent of Asian Americans speak a language other than English at home and 29 percent have limited English-language proficiency, meaning that English is not their primary language and they have a limited ability to read, write, speak, or understand English.<sup>10</sup> In addition, 28 percent of Native Hawaiians and Pacific Islanders speak a language other than English at home, and collectively these communities make up 22 percent of individuals with limited English-language proficiency in the country.<sup>11</sup>

Latinx households where Spanish is primarily spoken will also be negatively impacted by the proposed rule. In a 2018 poll, about 6 in 10 Latinx adults reported having trouble communicating with their providers about their health care needs due to language or cultural barriers.<sup>12</sup> Latinx individuals who had limited proficiency of English were more likely to experience poor health

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<sup>9</sup> K. Proctor, et al., *The Limited English Proficient Population: Describing Medicare, Medicaid, and Dual Beneficiaries*, HEALTH EQUITY 2(1), 82-89, <https://www.liebertpub.com/doi/full/10.1089/heq.2017.0036>.

<sup>10</sup> Asian & Pacific Islander Am. Health Forum, Analysis of 2017 American Community Survey Data.

<sup>11</sup> *Id.*

<sup>12</sup> Emily Swanson, et al., “AP-NORC Poll: Latinos health care communication woes,” ASSOCIATED PRESS (July 27, 2018), <https://apnews.com/c64161775eca4ebcbedee919d6102428> (accessed June 20, 2019).

outcomes than Latinx persons who were bilingual or who exclusively spoke English.<sup>13</sup>

Section 1557's taglines are a vital, cost-effective means of ensuring that individuals with limited English-language proficiency enjoy full and equal access to healthcare services. The same is true of its language access plans, which are absent in the proposed rule, but which the Final Rule expressly encouraged. In addition to being sound policy that "ensure[s] ... individuals are aware of their protections under the law,"<sup>14</sup> taglines and language access plans are supported by long-standing federal practice as well as federal and state regulations and guidance.<sup>15</sup> The cost of facilitating these programs is NOT unduly burdensome or otherwise significant; instead, the cost estimates relied on by HHS were highly speculative and failed to consider alternatives to a complete repeal.

Because the proposed rule overlooks sound policy and fact and serves to exacerbate existing health disparities, it should be withdrawn.

## **5. The Proposed Rule Impedes the Provision of Healthcare to People With HIV/AIDS and Other Serious Medical Conditions**

If implemented, the proposed rule will also impede the provision of healthcare to people with HIV/AIDS and other chronic medical conditions. Due to systemic barriers to health care, LGBTQI people have a "higher prevalence and earlier onset of disabilities" and disproportionately experience chronic conditions including HIV.<sup>16</sup> HIV disproportionately affects gay, bisexual, and queer men of color and transgender women of color.<sup>17</sup> For example, more than 25 percent of Black and Brown transgender women are living with HIV,<sup>18</sup> and 60 percent (10,070) of Black or African American individuals who received an HIV diagnosis in

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<sup>13</sup> Rachel Showstack, et al., "Improving Latino Health Equity Through Spanish Language Interpreter Advocacy in Kansas," *Hispanic Health Care International* (2018), available at <https://journals.sagepub.com/doi/abs/10.1177/1540415318818706#articlePermissionsContainer>, (accessed June 20, 2019).

<sup>14</sup> Nondiscrimination in Health Programs and Activities, Notice of Proposed Rulemaking, 45 CFR Part 92 (September 8, 2015).

<sup>15</sup> See Title VI Coordination Regulations, 29 C.F.R. § 42.405(d)(1); Marketplace and QHP Issuer Requirements, 45 C.F.R. § 155.205(c)(2)(iii); Medicaid Managed Care Plans, 42 C.F.R. § 438.10(d)(3); DOL WIOA Nondiscrimination Requirements, 29 C.F.R. § 38.9(g)(3); USDA SNAP Bilingual Requirements, 7 C.F.R. § 272.4(b); and the 2003 HHS LEP Guidance. In addition, HHS's Office of Civil Rights has required language access plans in Title VI enforcement actions involving individuals with limited English-language proficiency for more than two decades. Executive Order 13166 issued in 2000 also required HHS create and implement a language access plan for its federally conducted programs and activities.

<sup>16</sup> Lourdes Ashley Hunter, Ashe McGovern & Carla Sutherland, eds., *Intersecting Injustice: A National Call to Action* 48, 63 (2018), [http://socialjusticesexuality.com/intersecting\\_injustice/](http://socialjusticesexuality.com/intersecting_injustice/).

<sup>17</sup> *Id.* at 63-64.

<sup>18</sup> *Id.*

2017 were gay or bisexual men.<sup>19</sup> Further, 26 percent of gay men, 36 percent of bisexual women, 36 percent of lesbian women, and 40 percent of bisexual men experience a form of disability.<sup>20</sup> Additionally, 28 percent of transgender, non-binary, and gender nonconforming people experience a form of disability.<sup>21</sup>

Yet, under the proposed rule, a person's mere status as LGBTQI would authorize healthcare providers and insurers to decline treatment or coverage—exacerbating a public health crisis which already has its roots in anti-LGBTQI bias and stigma. Denial of care for HIV or any other chronic illness would spell death for many; therefore HHS should withdraw its proposed rule to prevent foreseeable worsening of the HIV/AIDS crisis.

## **6. The Proposed Rule Unduly Burdens Constitutionally Protected Reproductive Rights**

The Center for Constitutional Rights also objects to the proposed rule because it discourages members of the public from exercising their constitutionally-protected reproductive rights. Whereas the existing rule makes clear that sex discrimination under Section 1557 includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, recovery therefrom, childbirth, or related conditions, the proposed rule rolls back critical protections.

Under the proposed rule, anyone who has sought an abortion or suffered a miscarriage can be discriminated against and denied healthcare services by covered entities and providers—thereby giving sanction to an invidious form of sex discrimination. The consequences of the healthcare discrimination authorized by the rule will be borne most heavily by people with limited resources and ability to travel, including women and transgender people of color living in poverty or rural areas or on reservations. Also negatively impacted are trans-masculine and non-binary people assigned female at birth, who are already hesitant to access reproductive healthcare due to the psychological distress associated with a system geared toward women.

Because the effect of this rule will be to disparately impact trans-masculine persons and exacerbate the already sky-high rates of maternal mortality that exist among Black and Native American women,<sup>22</sup> the Center for Constitutional Rights insists that the rule be withdrawn.

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<sup>19</sup> Ctrs. for Disease Control & Prevention, *HIV and African Americans*, <https://www.cdc.gov/hiv/group/raciaethnic/africanamericans/index.html> (last updated Mar. 19, 2019).

<sup>20</sup> Disabled World, *LGBT and Disability: Information, News and Fact Sheets*, <https://www.disabled-world.com/disability/sexuality/lgbt/> (last updated Feb. 7, 2019).

<sup>21</sup> 2015 U.S. Transgender Survey at 247.

<sup>22</sup> Roni Caryn Rabin, *Huge Racial Disparities Found in Deaths Linked to Pregnancy*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/health/pregnancy-deaths- html>.

## **7. The Proposed Rule Prevents Countless Americans from Obtaining Life-Saving Medical Treatment and Preventative Care**

The proposed rule will also make it harder for countless Americans to access life-saving care. A peer-reviewed study conducted in 2019 revealed that transgender women and sexual minorities were more likely to succumb to cancer than their non-transgender counterparts due to the very harms that Section 1557 seeks to prevent—lack of health insurance, lack of access to primary care doctors, and lack of preventive healthcare treatment.<sup>23</sup> By revoking discrimination protections for transgender people and other vulnerable groups, the proposed rule will only increase these disparities.

In conclusion, the rule proposed by HHS poses a grave danger to patients as well as the public by threatening healthcare access for individuals and eroding the civil rights protections carefully adopted by Congress. The proposed rule will also result in devastating public health outcomes, as described above, that ultimately increase the healthcare costs borne by taxpayers. Accordingly, the Center for Constitutional Rights calls upon HHS to promptly rescind its proposed Section 1557 rule.

Sincerely,



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<sup>23</sup> Maya Oppenheim, *Gay and transgender women have lower cancer survival rates, study reveals*, THE INDEPENDENT UK (May 20, 2019), <https://www.independent.co.uk/news/world/americas/gay-transgender-women-cancer-risk-heterosexual-lgbt-a8921831.html> (last visited Aug. 13, 2019).