

1 Shannon Minter (SBN 168907)
2 Julie Wilensky (SBN 271765)
3 NATIONAL CENTER FOR
4 LESBIAN RIGHTS
5 870 Market Street, Suite 370
6 San Francisco, CA 94102
7 Tel.: (415) 392-6257
8 Fax: (415) 392-8442
9 sminter@nclrights.org
10 jwilensky@nclrights.org

11 *Attorneys for Amici Curiae*
12 *National Center for Lesbian Rights et al.*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 CITY AND COUNTY OF SAN FRANCISCO,

16 *Plaintiff,*

17 v.

18 ALEX M. AZAR II et al.,

19 *Defendants.*

20 STATE OF CALIFORNIA, by and through
21 XAVIER BECERRA, Attorney General,

22 *Plaintiff,*

23 v.

24 ALEX M. AZAR II et al.,

25 *Defendants.*

26 COUNTY OF SANTA CLARA et al.,

27 *Plaintiffs,*

28 v.

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

Defendants.

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

**[PROPOSED] BRIEF OF NATIONAL
CENTER FOR LESBIAN RIGHTS ET
AL. AS AMICI CURIAE IN SUPPORT
OF PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT**

Hearing Date: October 30, 2019
Time: 8:00 a.m.
Courtroom 12, 19th Floor
Judge: The Honorable William Alsup

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES ii

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

4 ARGUMENT 2

5 I. THE FINAL RULE WILL HARM LGBTQ PATIENTS. 2

6 A. LGBTQ People Face Significant Barriers to Accessing Health Care, Including

7 Pervasive and Harmful Discrimination in Health Care Settings. 3

8 B. The Final Rule Will Exacerbate Barriers to Health Care for LGBTQ People..... 11

9 CONCLUSION..... 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006).....3

Prescott v. Rady Children’s Hospital-San Diego,
265 F. Supp. 3d 1090 (C.D. Cal. 2017)9

Statutes

42 U.S.C. § 18116(a)14

Regulations

Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,
84 Fed. Reg. 23,170 (May 21, 2019) *passim*

Other Authorities

Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It*, Washington Post (Feb. 19, 2015),
<https://perma.cc/V8ZQ-BWVK>6

Am. Medical Ass’n, House of Delegates, Resolution 122 (A-08), Resolution on Removing Financial Barriers to Care for Transgender Patients (2008),
<https://perma.cc/D88W-AZTU>12, 14

Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013)12

Andrew Satter & Sarah McBride, Ctr. for Am. Progress, *Their Baby Was Denied Access to Care Because They Are Gay* (July 21, 2015),
<https://perma.cc/WUR8-UJFL>6

Ann P. Haas et al., Am. Foundation for Suicide Prevention & UCLA Williams Inst., *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* (2014),
<https://perma.cc/R3B6-4EL5>11

Carl G. Streed et al., *Association Between Gender Minority Status and Self-Reported Physical and Mental Health in the United States*, 177 JAMA Internal Medicine 1210 (2017), <https://perma.cc/5XU9-VBC2>11

Christine Grimaldi, *It’s ‘Scary,’ But Transgender Patients Are Fighting Trump’s Health-Care Discrimination Agenda*, Rewire.News (Mar. 13, 2018),
<https://perma.cc/AHF3-YQKR>5, 10

1 Human Rights Watch, *All We Want Is Equality: Religious Exemptions and*
 2 *Discrimination Against LGBT People in the United States* (2018),
 3 <https://perma.cc/XM5N-NC2G>.....6
 4 Human Rights Watch, “*You Don’t Want Second Best*”: *Anti-LGBT*
 5 *Discrimination in US Health Care* (2018), <https://perma.cc/79KG-W3QU> *passim*
 6 Inst. of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender*
 7 *People: Building a Foundation for Better Understanding* (2011),
 8 <https://perma.cc/G9RY-SBXN>3, 4
 9 Jaime M. Grant et al., Nat’l Ctr. for Transgender Equality & Nat’l Gay and
 10 Lesbian Task Force, *Injustice at Every Turn: A Report of the National*
 11 *Transgender Discrimination Survey* (2011), <https://perma.cc/9TGK-4GA3>5, 9
 12 Karen I. Fredriksen-Goldsen et al., *Health Disparities Among Lesbian, Gay, and*
 13 *Bisexual Older Adults: Results from a Population-Based Study*, 103 *Am. J.*
 14 *Pub. Health* 1802 (2013), <https://perma.cc/27PX-BX7R>.....3
 15 Karen I. Fredriksen-Goldsen et al., *Physical and Mental Health of Transgender*
 16 *Older Adults: An At-Risk and Underserved Population*, 54 *Gerontologist* 488
 17 (2014), <https://perma.cc/RK3L-7MMS>3
 18 Kellan Baker & Laura E. Durso, Ctr. for Am. Progress, *Why Repealing the*
 19 *Affordable Care Act Is Bad Medicine for LGBT Communities* (Mar. 22, 2017),
 20 <https://perma.cc/ZWH5-TXZK>.....3
 21 Kristie L. Seelman et al., *Transgender Noninclusive Healthcare and Delaying*
 22 *Care Because of Fear: Connections to General Health and Mental Health*
 23 *Among Transgender Adults*, 2.1 *Transgender Health* 18 (2017),
 24 <https://perma.cc/3CZZ-JDWK>.....4, 10, 11
 25 Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s Survey of*
 26 *Discrimination Against LGBT People and People with HIV* (2010),
 27 <https://perma.cc/B8TC-MJS4>4, 8
 28 Lourdes Ashley Hunter et al., *Intersecting Injustice: Addressing LGBTQ Poverty*
and Economic Justice for All (2018), <https://perma.cc/DC6H-228W>3
 Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite*
Sexual Minorities Still Experience Disparities in Access to Care, 36 *Health*
Affairs 1786 (2017).....4
 Rich Bellis, *LGBTQ Workers Still Face Higher Unemployment Rates*, *Fast*
Company (Nov. 8, 2017), <https://perma.cc/X9LU-WPEP>3
 S.E. James et al., Nat’l Ctr. for Transgender Equality, *2015 U.S. Transgender*
Survey (2016), <https://perma.cc/86HL-NJC4> *passim*

1 Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for Am. Progress, *Discrimination*
 2 *Prevents LGBTQ People from Accessing Health Care* (Jan. 18, 2018),
 3 <https://perma.cc/X9TN-5Q3U> *passim*
 4 U.S. Ctrs. for Disease Control & Prevention, *About LGBT Health*,
 5 <https://perma.cc/C3WD-NEKY> 4
 6 U.S. Ctrs. for Disease Control & Prevention, *HIV and African American Gay and*
 7 *Bisexual Men*, <https://perma.cc/5X46-X9E5> 3
 8 U.S. Dep’t of Health & Hum. Servs., *About HHS*, <https://perma.cc/5DGR-TNMM> 2
 9 U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020, Lesbian, Gay,*
 10 *Bisexual, and Transgender Health*, <https://perma.cc/UQ43-E75T> 3, 11
 11 World Professional Ass’n for Transgender Health, *Position Statement on Medical*
 12 *Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the*
 13 *U.S.A.* (Dec. 21, 2016), <https://perma.cc/N3SL-NZQ5> 12
 14 World Professional Ass’n for Transgender Health, *Standards of Care for the*
 15 *Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th
 16 Version 2011), <https://perma.cc/FYN2-YZQX> 12
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

IDENTITY AND INTEREST OF AMICI CURIAE¹

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

- National Center for Lesbian Rights
- Bay Area Lawyers for Individual Freedom
- Center for Constitutional Rights
- Equality California
- Equality Federation
- Empire Justice Center
- Family Equality
- FORGE
- FreeState Justice, Inc.
- GLBTQ Legal Advocates & Defenders
- Human Rights Campaign
- Legal Voice
- LGBT Bar Association of New York
- Movement Advancement Project
- National Center for Transgender Equality
- National LGBTQ Task Force
- National Trans Bar Association
- One Colorado
- OutFront Minnesota
- SAGE
- San Francisco LGBT Center

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

- 1 • Transgender Law Center; and
- 2 • Transgender Legal Defense and Education Fund, Inc.

3 Individual statements for each amicus are in the accompanying Motion.

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

9 ARGUMENT

10 I. THE FINAL RULE WILL HARM LGBTQ PATIENTS.

11 The mission of the Department of Health and Human Services ("HHS") is "to enhance
 12 and protect the health and well-being of all Americans," which HHS fulfills "by providing for
 13 effective health and human services and fostering advances in medicine, public health, and social
 14 services."³ HHS has an important role in ensuring equal access to health care and ending
 15 discriminatory practices contributing to poor health outcomes and health disparities.⁴ But the
 16 Final Rule will do exactly the opposite. In particular, the Final Rule will harm LGBTQ patients,
 17 who already face significant barriers to health care, including pervasive and harmful

18
 19 ² Many Amici submitted comments expressing concerns with the proposed rule. *See* Comment
 20 Nos. HHS-OCR-2018-0002-69074 (NCLR) ("NCLR Comment"); HHS-OCR-2018-0002-71044
 21 (Equality California); HHS-OCR-2018-0002-71892 (Empire Justice Center); HHS-OCR-2018-
 22 0002-69877 (Forge, Inc.); HHS-OCR-2018-0002-69268 (HIV Health Care Access Work Group,
 23 joined by Equality Federation); HHS-OCR-2018-0002-70389 (Family Equality Council); HHS-
 24 OCR-2018-0002-34036 (FreeState Justice, Inc.); HHS-OCR-2018-0002-70466 (GLBTQ Legal
 25 Advocates & Defenders); HHS-OCR-2018-0002-70848 (Human Rights Campaign); HHS-OCR-
 26 2018-0002-68010 (Movement Advancement Project); HHS-OCR-2018-0002-71274 (National
 27 Center for Transgender Equality); HHS-OCR-2018-0002-71509 (National LGBTQ Task Force);
 28 HHS-OCR-2018-0002-58212 (One Colorado Education Fund); HHS-OCR-2018-0002-68429
 (SAGE); HHS-OCR-2018-0002-71816 (Transgender Law Center); HHS-OCR-2018-0002-71256
 (New York State LGBT Health & Human Services Network, joined by Transgender Legal
 Defense and Education Fund, Inc.).

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

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

1 discrimination in health care settings. It will invite discrimination and exacerbate the barriers
 2 LGBTQ people face in accessing care. The harm the Final Rule will cause to LGBTQ patients
 3 supports the grant of a permanent injunction. *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547
 4 U.S. 388, 391 (2006) (articulating test for permanent injunction).

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

7 LGBTQ people face significant barriers to accessing health care, including higher rates of
 8 poverty,⁵ unemployment,⁶ and uninsurance⁷ than people who are not LGBTQ. LGBTQ people
 9 also experience health disparities,⁸ which are particularly severe for older adults, youth,
 10 transgender people, and people of color.⁹ As HHS's Healthy People 2020 initiative has
 11 recognized, these disparities are linked to stigma and discrimination: "LGBT individuals face
 12 health disparities linked to societal stigma, discrimination, and denial of their civil and human
 13 rights."¹⁰ HHS has also stated that "[s]ocial determinants affecting the health of LGBT
 14

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

21 ⁶ Rich Bellis, *LGBTQ Workers Still Face Higher Unemployment Rates*, Fast Company (Nov. 8,
 22 2017), <https://perma.cc/X9LU-WPEP>; S.E. James et al., Nat'l Ctr. for Transgender Equality,
 23 *2015 U.S. Transgender Survey* 98 (2016), <https://perma.cc/86HL-NJC4>.

24 ⁷ Kellan Baker & Laura E. Durso, Ctr. for Am. Progress, *Why Repealing the Affordable Care Act*
 25 *Is Bad Medicine for LGBT Communities* (Mar. 22, 2017), <https://perma.cc/ZWH5-TXZK>
 26 (finding that 15% of LGBT respondents and 25% of transgender respondents were uninsured in
 27 2017, compared to 7% of non-LGBT people).

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

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

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

1 individuals largely relate to oppression and discrimination.”¹¹ A recent study found that
 2 individuals face significant barriers to health care as a result of discrimination based on a number
 3 of often intersecting factors, including transgender status, sexual orientation, race, and economic
 4 factors.¹² As described below, LGBTQ people experience widespread discrimination in health
 5 care settings, which causes severe and lasting harm.

6 Discrimination against LGBTQ people in health care settings is well-documented,¹³
 7 particularly with respect to transgender people, who “are often forced to navigate a healthcare
 8 system that is resistant at best and at times openly hostile toward transgender people’s needs.”¹⁴
 9 A 2010 study by Lambda Legal found that 56% of lesbian, gay, and bisexual respondents had
 10 experienced instances of discrimination in health care, such as refusal of health care, excessive
 11 precautions used by health care professionals, and physically rough or abusive behavior by
 12 health care professionals.¹⁵ Seventy percent of transgender and gender non-conforming
 13 respondents experienced the same, as had 63% of respondents living with HIV.¹⁶ The study also
 14 found that respondents of color and low-income respondents experienced higher rates of
 15 discrimination and substandard care.¹⁷ More recently, the 2015 U.S. Transgender Survey, a
 16 national survey of nearly 28,000 people, found that 33% of respondents who saw a health care
 17 provider in the past year had at least one negative experience related to being transgender, with a
 18

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

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

25 ¹³ *See, e.g.*, NCLR Comment, *supra*, at 4 & n.8; Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for
 26 Am. Progress, *Discrimination Prevents LGBTQ People from Accessing Health Care* (Jan. 18,
 27 2018), <https://perma.cc/X9TN-5Q3U>; James et al., *supra*, at 93-125; Lambda Legal, *When
 28 Health Care Isn’t Caring: Lambda Legal’s Survey of Discrimination Against LGBT People and
 People with HIV* (2010), <https://perma.cc/B8TC-MJS4>; *see also* Inst. of Medicine, *supra*, at 61-
 67 (discussing barriers that LGBT people face in accessing health care).

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

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

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 11.

1 higher percentage for transgender men, people with disabilities, and those who identified as
 2 American Indian, Black, Middle Eastern, or multiracial.¹⁸ Types of negative experiences
 3 included: having to teach the provider about transgender people to get appropriate care, a health
 4 care provider asking unnecessary or invasive questions, being refused medical care, being
 5 verbally harassed in a health care setting, having a provider use harsh or abusive language when
 6 treating them, or being physically attacked or sexually assaulted in a health care setting.¹⁹

7 Outright refusals of care based on a patient’s sexual orientation or gender identity are
 8 widespread, especially with respect to transgender people. A nationally representative study from
 9 the Center for American Progress in 2017 showed that among LGBTQ respondents who saw a
 10 health care provider in the past year, 29% of transgender respondents, and 8% of lesbian, gay,
 11 bisexual, and queer respondents, said a provider refused to see them because of their actual or
 12 perceived gender identity or sexual orientation.²⁰ Some denials of care involve specific services
 13 related to sexual orientation or transgender status, such as fertility or assisted reproductive
 14 services for a same-sex couple, or hormone therapy for a transgender person.²¹ And some are
 15 denials of care for medical treatments that are completely unrelated to the person’s LGBTQ
 16 identity. For example, a respondent to a national survey of transgender people said, “I have been
 17 refused emergency room treatment even when delivered to the hospital by ambulance with
 18 numerous broken bones and wounds.”²²

19 Many LGBTQ people have experienced a denial or delay of medical care due to a
 20 provider’s religious beliefs. In 2015, a lesbian couple in Michigan brought their six-day-old
 21 newborn to the pediatrician for a check-up and were told the pediatrician would not see the infant

22
 23 ¹⁸ James et al., *supra*, at 96 fig.7.3.

24 ¹⁹ *Id.*

25 ²⁰ Mirza & Rooney, *supra*.

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

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

1 because of the doctor’s religious objections.²³ A social worker told Human Rights Watch that a
 2 transgender child was accepted for treatment at a religiously affiliated psychiatric practice, but
 3 then turned away when the doctor learned the child was transgender.²⁴ As the social worker
 4 explained:

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

10 A lesbian in Mississippi reported that when she and her wife were seeking a fertility doctor in
 11 2012, the receptionist said that the doctor would not see them because “[i]t’s his religious belief
 12 that he only treats straight married couples.”²⁶ Human Rights Watch also reported that the
 13 mother of a gay teenager called a pediatric practice and said, “we’ve seen you our whole life and
 14 our son is gay and we just wanted to make sure it wouldn’t be an issue,” to which the
 15 pediatrician replied, “you need to understand this is a Christian-based office and we may not be a
 16 good fit for your family any longer.”²⁷ And at Catholic hospitals, based on religious directives,
 17 transgender men have experienced the abrupt cancellation of medically necessary, scheduled
 18 hysterectomies, even though those hospitals permit hysterectomies to be performed for patients
 19 who are not transgender.²⁸

20
 21 ²³ Andrew Satter & Sarah McBride, Ctr. for Am. Progress, *Their Baby Was Denied Access to*
 22 *Care Because They Are Gay* (July 21, 2015), <https://perma.cc/WUR8-UJFL>; Abby Phillip,
 23 *Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It*,
 24 Washington Post (Feb. 19, 2015), <https://perma.cc/V8ZQ-BWVK>.

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

26 ²⁵ *Id.*

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

29 ²⁷ *Id.* at 22.

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

1 Denying necessary medical care for any reason, including a provider’s religious beliefs,
 2 has direct health consequences for patients. As UCLA’s Williams Institute stated in comments
 3 on the proposed Rule, “[a]n individual who is denied care must, at a minimum, experience the
 4 inconvenience of seeking alternative providers for the service,” which “can be especially critical
 5 for individuals who live in communities where no such alternatives are available or where
 6 reaching an alternative care provider can only be done with great cost and effort.”²⁹ LGBTQ
 7 people often have to travel long distances to find LGBTQ-friendly providers or to receive
 8 specific care. For example, the U.S. Transgender Survey reported that 29% of respondents
 9 seeking transition-related care had to travel 25 miles or more to access it.³⁰ Human Rights Watch
 10 interviewed LGBTQ people who described driving across Michigan to find a friendly nurse
 11 practitioner or medical practice, driving from East Tennessee to North Carolina for regular
 12 hormone injections, and traveling two hours each way to attend therapy or meet with a trans-
 13 affirming doctor in another state.³¹ In the 2017 study from Center for American Progress, nearly
 14 1 in 5 LGBTQ people, including 31% of transgender people, said that if they were turned away
 15 by a hospital, it would be “very difficult” or “not possible” to find the same type of service at
 16 another hospital.³² The rate was much higher – 41% – for LGBTQ people living outside of a
 17 metropolitan area.³³ For these patients, being turned away by a medical provider may result in
 18 being denied care entirely.³⁴

19 Even when doctors or other providers do not turn them away, LGBTQ people experience
 20 other forms of discrimination in health care settings. In an example shared by Lambda Legal, a
 21 lesbian in Texas brought her two-year old child to a pediatric dentist after the child fell and her
 22
 23

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

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

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

28 ³² Mirza & Rooney, *supra*.

³³ *Id.*

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

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

14 Transgender people are particularly likely to experience discrimination and mistreatment
 15 in health care settings. In the 2017 Center for American Progress study, 23% of transgender
 16 respondents who had seen a doctor or other health care provider in the past year said a healthcare
 17 provider intentionally refused to recognize their gender identity and deliberately referred to them
 18 by the wrong name or pronouns.³⁹ As the mother of a transgender teenager told Human Rights
 19 Watch, “I said these are his name and his pronouns and he was sitting there, and the doctor uses
 20 his birth name and pronouns After the doctor left, [my son] cried for a solid ten minutes,
 21 and said I don’t want to come back here ever again.”⁴⁰ A respondent to the U.S. Transgender
 22 Survey shared, “I was consistently misnamed and misgendered throughout my hospital stay. I
 23

24
 25 ³⁵ See Br. of Amici Curiae Lambda Legal Defense & Education Fund, Inc., Family Equality
 26 Council, et al. in Support of Respondents 18-19, *Masterpiece Cakeshop, Ltd. v. Colo. Civil
 Rights Comm’n*, No. 16-111, <https://perma.cc/SQ2F-XG5N>.

27 ³⁶ *Id.*

28 ³⁷ Mirza & Rooney, *supra*.

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

³⁹ Mirza & Rooney, *supra*.

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

1 passed a kidney stone during that visit. On the standard 1-10 pain scale, that's somewhere around
2 a 9. But not having my identity respected, that hurt far more."⁴¹

3 Providers' refusal to recognize a transgender patient's gender identity by deliberately
4 refusing to use a transgender person's name and pronouns can also result in dangerous denials of
5 care. NCLR and Transgender Law Center represented the mother of Kyler Prescott, a
6 transgender boy, who was admitted to a hospital inpatient psychiatric unit in San Diego because
7 of his suicidal thoughts. *See Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d
8 1090, 1096 (C.D. Cal. 2017) (citing complaint). Although hospital staff assured Kyler's mother
9 that Kyler's gender identity would be respected and that staff would refer to Kyler with male
10 gender pronouns, staff repeatedly addressed and referred to Kyler as a girl. Kyler reported that
11 one employee said, "Honey, I would call you he, but you're such a pretty girl." *Id.* at 1097
12 (quoting complaint). "Despite concerns over Kyler's continuing depression and suicidal
13 thoughts, Kyler's medical providers concluded that he should be discharged early from the hold
14 at [the hospital] because of the staff's conduct." *Id.* (citing complaint).

15 Transgender people are also disproportionately likely to experience mockery, harsh and
16 abusive language, and unwanted physical contact from healthcare providers and office staff. The
17 Center for American Progress found that that among transgender respondents who visited a
18 doctor or other health care provider in the past year, 21% said a doctor or other health care
19 provider used harsh or abusive language in treating them, and 29% said they experienced
20 unwanted physical contact (such as fondling, sexual assault, or rape) from a doctor or other
21 health care provider.⁴² A respondent to another national survey reported, "I was forced to have a
22 pelvic exam by a doctor when I went in for a sore throat. The doctor invited others to look at me
23 while he examined me and talked to them about my genitals."⁴³ Human Rights Watch reported
24 an incident where a transgender woman was being treated for cardiomyopathy, and a nurse "left
25 the room[] and audibly told another nurse to come look at [the patient's] breasts."⁴⁴ Another
26

27 ⁴¹ James et al., *supra*, at 96.

28 ⁴² Mirza & Rooney, *supra*.

⁴³ Grant, *supra*, at 74.

⁴⁴ Human Rights Watch, "You Don't Want Second Best," *supra*, at 19.

1 transgender woman reported hearing nurses' and office staff's "giggles" and "snickers" when she
 2 began to live openly as a transgender woman."⁴⁵

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

10 Multiple medical professionals have misgendered me, denied to me that I was
 11 transgender or tried to persuade me that my trans identity was just a misdiagnosis
 12 of something else, have made jokes at my expense in front of me and behind my
 13 back, and have made me feel physically unsafe. I often do not seek medical
 attention when it is needed, because I'm afraid of what harassment or
 discrimination I may experience in a hospital or clinic.⁴⁸

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

21 The examples discussed above show the range of harms resulting from discrimination
 22 against LGBTQ people in health settings, including the practical harms when specific medical
 23 care is delayed or denied, the emotional harm resulting from the experience of discrimination,
 24 and poor health outcomes. As UCLA's Williams Institute explained in a comment to the

25 _____
 26 ⁴⁵ Grimaldi, *supra*.

27 ⁴⁶ Human Rights Watch, "You Don't Want Second Best," *supra*, at 25-26.

28 ⁴⁷ James et al., *supra*, at 98.

⁴⁸ *Id.* at 96.

⁴⁹ See Mirza & Rooney, *supra*.

⁵⁰ Seelman et al., *supra*, at 25.

1 proposed rule, “refusals of service based on sexual orientation or gender identity are ‘minority
 2 stressors’ that can profoundly harm the health and well-being of LGBT people who are directly
 3 subject to these refusals of service.”⁵¹ In particular, “[w]hen a health care provider denies care or
 4 provides lesser care to an LGBT person because of their sexual orientation or gender identity –
 5 regardless of the intent behind the discrimination – it is a prejudice event, a type of minority
 6 stress, which has both tangible and symbolic impacts on the LGBT patient.”⁵² As noted above,
 7 HHS’s Healthy People 2020 initiative has recognized that LGBTQ health disparities are linked
 8 to stigma and discrimination.⁵³ The U.S. Transgender Survey found that transgender people were
 9 nearly eight times more likely than the general population to be experiencing significant
 10 psychological distress, which was “associated with a variety of experiences of rejection,
 11 discrimination, and violence.”⁵⁴ In addition, *sixty percent* of respondents in a national study of
 12 transgender and gender non-conforming people who had been refused medical care because of
 13 anti-transgender bias reported a lifetime suicide attempt, a rate significantly higher than the
 14 percentage of respondents as a whole.⁵⁵

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

16 The Final Rule will compound barriers to health care for LGBTQ people, particularly
 17 those who are transgender, by inviting healthcare workers to refuse services or referrals to
 18 LGBTQ people. HHS contemplates that more healthcare workers will raise religious- or
 19 conscience-related objections: it states that “[t]he Department expects that, as a result of this rule,
 20 more individuals, having been apprised of those rights, will assert them.” 84 Fed. Reg. at 23,250.

21
 22 ⁵¹ UCLA Williams Inst. Comment 8-9.

23 ⁵² *Id.* at 9. This is consistent with research on “minority stress,” a framework for understanding
 24 high rates of poor mental health and other disparities in a minority population resulting from
 25 chronic stressors such as stigma and discrimination. *See, e.g.,* Seelman et al., *supra*, at 19
 26 (reviewing studies); Carl G. Streed et al., *Association Between Gender Minority Status and Self-*
 27 *Reported Physical and Mental Health in the United States*, 177 JAMA Internal Medicine 1210
 28 (2017), <https://perma.cc/5XU9-VBC2>.

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

⁵⁴ James et al., *supra*, at 105-07.

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

1 And although HHS fails to adequately consider the costs to patients who will be denied care as a
 2 result of the Final Rule,⁵⁶ it acknowledges that “[d]ifferent types of harm can result from denial
 3 of a particular procedure based on an exercise of belief or conviction.” 84 Fed. Reg. at 23,251.
 4 HHS provides no evidence for its unsupported assertion that Final Rule will generate “significant
 5 overall increases in access” to health care. *Id.* at 23,252. This speculation flies in the face of the
 6 well-documented experiences of LGBTQ people in health care settings and the wide-ranging,
 7 lasting harms that result from denials of care, as well as the fear of denials of care or other forms
 8 of discrimination. As discussed below, the Final Rule will result in an increase in refusals of care
 9 to LGBTQ patients, particularly transgender people, and ambiguous language in the Final Rule
 10 may be misinterpreted to permit wider, status-based discrimination against LGBTQ patients.

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

18 The Final Rule, although ambiguous, appears to suggest that HHS may consider certain
 19 treatments for gender dysphoria as “sterilization.” As Plaintiffs’ expert Dr. Randi Ettner has
 20

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

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

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

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

1 stated, “[e]quating . . . gender confirmation surgery that has been prescribed to treat gender
 2 dysphoria with sterilization is medically inaccurate,” and “[p]rocedures undertaken for the
 3 purpose of sterilization are distinct from medical procedures undertaken for other purposes that
 4 incidentally affect reproductive function.” Decl. of Randi Ettner ¶ 46, *County of Santa Clara v.*
 5 *HHS*, No. 19-cv-02916-WHA. The Final Rule twice references *Minton v. Dignity Health*, No.
 6 17-558259 (Cal. Super. Ct. Apr. 19, 2017), a lawsuit by a transgender man who challenged a
 7 Catholic hospital’s sudden cancellation of his hysterectomy, which Mr. Minton was undergoing
 8 as part of his course of treatment for gender dysphoria. The hospital cancelled Mr. Minton’s
 9 scheduled hysterectomy when it learned Mr. Minton was transgender, although the hospital
 10 routinely permits hysterectomies to be performed for patients who are not transgender.⁶⁰ HHS
 11 lists the *Minton* case as an example of lawsuits “claiming that Federal or State laws require
 12 private religious entities to perform . . . sterilizations,” 84 Fed. Reg. 23,178, and also includes the
 13 case in its “overview of reasons” for the Final Rule, *id.* at 23,176 n.27. In response to comments
 14 seeking clarification on HHS’s interpretation of “sterilization” and treatment for gender
 15 dysphoria, HHS states that it will consider any complaints on a “case-by-case basis.” *Id.* at
 16 23,205.

17 The Rule thus appears to invite healthcare workers – defined extraordinarily broadly to
 18 include even a person who schedules procedures, *see id.* at 23,186 – to refuse certain treatment to
 19 transgender people, even if the provider routinely performs the same procedure, such as a
 20 hysterectomy, for patients who are not transgender. This will be extremely harmful. As noted
 21 above, while denials of any kind of needed medical care can have negative consequences, denial
 22 of treatment for gender dysphoria can be particularly devastating. Even if a patient who is
 23 refused care ultimately obtains the procedure sought from another provider or at another facility,
 24 delays in gender-affirming medical care exacerbate the gender dysphoria that the medical care is
 25 designed to treat. In addition, as the American Medical Association has recognized, delaying
 26 treatment for gender dysphoria “can cause and/or aggravate additional serious and expensive
 27
 28

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

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

3 Second, the Final Rule contains additional ambiguous language that may be misconstrued
4 by healthcare workers and patients as permitting status-based discrimination against LGBTQ
5 people, which is contrary to law and per se harmful, in addition to harming patients who will be
6 denied services or referrals as a result. In response to comments expressing concern that the Rule
7 would purport to cover areas beyond the scope of the underlying statutes, including "HIV
8 treatment, pre-exposure prophylaxis, and infertility treatment," HHS did *not* say that such areas
9 are outside the scope of the Final Rule or the underlying statutes. 84 Fed. Reg at 23,182. Rather,
10 HHS states that if it receives a complaint regarding these procedures, it would "examine the facts
11 and circumstances of the complaint to determine whether it falls within the scope of the statute in
12 question and these regulations." *Id.* And in response to comments expressing concern that the
13 rule could "impact counseling or referrals for LGBT *persons*," *id.* at 23,189 (emphasis added),
14 HHS declined to clarify that the Final Rule does not authorize the denial of services based on a
15 patient's sexual orientation or gender identity. Rather, HHS says it "does not pre-judge matters
16 without the benefit of specific facts and circumstances," and that it will evaluate particular
17 claims on a "case-by-case basis." *Id.* Nothing in the statutes underlying the Final Rule authorizes
18 status-based discrimination based on a patient's sex, including sexual orientation and gender
19 identity. Nor could it, as Section 1557 of the Affordable Care Act prohibits sex discrimination in
20 health programs or activities receiving federal financial assistance. 42 U.S.C. § 18116(a). Rather
21 than clearly affirming that such discrimination is unlawful, HHS appears to leave open the
22 possibility that it would construe the statutes underlying the Final Rule in a way that would allow
23 such mistreatment of LGBTQ people. This will only invite discrimination and discourage
24 LGBTQ people from seeking necessary health care.

25
26
27
28

⁶¹ Am. Medical Ass'n, *supra*, at 2.

1 **CONCLUSION**

2 For the reasons above, Amici urge the Court to grant Plaintiffs' motions for summary
3 judgment and issue an injunction permanently enjoining the Final Rule.

4
5 Dated: September 12, 2019

Respectfully submitted,

6 NATIONAL CENTER FOR
7 LESBIAN RIGHTS

8 By: /s Julie Wilensky

9 Shannon Minter
10 Julie Wilensky
11 NATIONAL CENTER FOR
12 LESBIAN RIGHTS
13 870 Market Street, Suite 370
14 San Francisco, CA 94102
15 Tel.: (415) 392-6257
16 Fax: (415) 392-8442

17 *Attorneys for Amici Curiae*
18 *National Center for Lesbian*
19 *Rights et al*