

August 13, 2019

Office for Civil Rights
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Submitted Electronically

Attention: Nondiscrimination in Health and Health Education Programs and Activities (Section 1557 NPRM), RIN 0945-AA11

Dear Secretary Azar,

The National Women's Law Center ("the Center") is writing to comment on the Department of Health and Human Services' ("the Department") Office for Civil Rights' ("OCR") proposed rule "Nondiscrimination in Health and Health Education in Programs or Activities" ("Proposed Rule").¹ Since 1972, the Center has worked to protect and advance the progress of women and their families in core aspects of their lives, including income security, employment, education, and reproductive rights and health, with an emphasis on the needs of low-income women and those who face multiple and intersecting forms of discrimination. To that end, the Center has long worked to end sex discrimination and to ensure all people have equal access to the full range of health care, including abortion and birth control, regardless of income, age, race, sex, sexual orientation, gender identity, ethnicity, geographic location, or type of insurance coverage.

Section 1557 of the Affordable Care Act (ACA) provides broad federal protection against sex discrimination in health care and health insurance. The prohibition on sex discrimination is properly understood to include discrimination based on gender identity, sexual orientation, sex stereotypes, and pregnancy, including termination of pregnancy. Section 1557 also importantly expands existing protections against health care discrimination based on race, color, national origin, age, and disability.

In 2016, after considerable public comment and deliberate consideration, including numerous meetings with stakeholders and two comment periods with over 25,000 comments, the Department issued strong and effective regulations implementing and enforcing Section 1557 of the ACA.² Now, the Department seeks to repudiate the 2016 Final Rule by deleting most of

¹ Nondiscrimination in Health and Health Education in Programs or Activities, 84 Fed. Reg. 27,846 (proposed June 14, 2019) (to be codified at 42 C.F.R. pts. 428, 440, & 460) [hereinafter *Proposed Rule*]

² Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) [hereinafter *Final Rule*].

the substantive provisions, adding unlawful exemptions, and dramatically narrowing the scope of Section 1557's regulations in direct opposition to what is required by the statute itself.

For the reasons outlined in this comment letter, the Proposed Rule is illegal, harmful, and discriminatory and must be rescinded in its entirety.

I. Section 1557 has gone a long way to address discrimination in health care and health insurance.

Section 1557 was intended to provide robust protections for people who face discrimination in health care because of their race, color, national origin, age, disability, or sex, including gender identity, sex stereotyping, pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related medical conditions. In enacting this provision, Congress sought to "remedy the shameful history of invidious discrimination and the stark disparities in outcomes in our health care system based on traditionally protected factors such as race and gender."³

The rampant sex discrimination women faced in the insurance market was a particular area of concern for Congress.⁴ As the Center documented, prior to the ACA, insurance companies rejected women for health coverage for a variety of "pre-existing conditions" that were unique to them, such as having had a Cesarean delivery, prior pregnancy, or breast or cervical cancer, or receiving medical treatment for domestic or sexual violence.⁵ Plans also charged women more than men for the same coverage, a practice known as gender rating. According to the Center's research, before the ACA took effect, gender rating was rampant in the individual market: 92% of best-selling plans on the individual market practiced gender rating - costing women approximately \$1 billion a year.⁶ Plans also refused to cover women's major health needs; for example, in 2008, only 12% of individual market plans covered maternity services.⁷

³ 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (Sen. Leahy).

⁴ E.g., 156 CONG. REC. H1632-04 (daily ed. March 18, 2010) (statement of Rep. Lee) ("While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system. Too many women are locked out of the health care system because they face discriminatory insurance practices and cannot afford the necessary care for themselves and for their children."); 156 CONG. REC. H1891-01 (daily ed. March 21, 2010) (statement of Rep. Pelosi) ("It's personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition."); 155 CONG. REC. S12,026 (daily ed. Oct. 8, 2009) (statements of Sen. Mikulski) ("[H]ealth care is a women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue because . . . when it comes to health insurance, we women pay more and get less."); 155 CONG. REC. S10,262-01 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) ("Women have even more at stake. Why? Because they are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform."); 156 CONG. REC. H1854-02 (daily ed. March 21, 2010) (statement of Rep. Maloney) ("Finally, these reforms will do more for women's health . . . than any other legislation in my career.").

⁵ Nat'l Women's Law Ctr., *Nowhere to Turn: How the Individual Health Insurance Market Fails Women* (2008) (on file with NWLC).

⁶ NAT'L WOMEN'S LAW CTR., TURNING TO FAIRNESS: INSURANCE DISCRIMINATION AGAINST WOMEN TODAY AND THE AFFORDABLE CARE ACT (March 2012), https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

⁷ See NAT'L WOMEN'S LAW CTR., *supra* note 6 at 4.

Several important ACA provisions were enacted specifically to correct these insurer practices that discriminated against women either on their face or in their effect,⁸ and Section 1557 was put into place alongside these specific provisions as an important backstop against discrimination. In other words, a primary purpose of the ACA was to end health care and health insurance practices that in their intent or in their effect resulted in gender-based discrimination.

By its terms, Section 1557 accomplishes its aims of addressing discrimination in health care by specifically referencing the bases protected by existing laws, namely Title VI, Title IX, the Americans with Disabilities Act, and the Age Discrimination Act. The 2016 Final Rule correctly drew upon the long-standing civil rights principles in the referenced statutes to define the scope of what it means to ban discrimination based on the protected characteristics and to guide enforcement. However, the 2016 Final Rule did not include the specific exceptions to those bans, because Congress spoke clearly as to the exceptions that apply to the ban on discrimination in health care in the text of Section 1557.

Importantly, Section 1557 also intended to remedy the problem of varying levels of protections and enforcement mechanisms depending on an individual's protected characteristics. This means that it recognizes that people can hold multiple identities that might be a basis for discrimination. For example, an immigrant woman seeking reproductive health care could face harassment because she is a woman and has limited English proficiency (LEP). Similarly, a provider could discriminate against a Black woman because of both her race and gender.

Since its passage, Section 1557 has been used to ensure that people on their parents' insurance plans could no longer be denied maternity coverage,⁹ health plans could no longer exclude coverage of transition-related care for transgender individuals,¹⁰ an individual could not be denied fertility services because of their age,¹¹ and health insurance companies would have to provide information about their services in the language a person speaks, not just English.¹²

⁸ 42 U.S.C. 300gg(a) (2012) (allowing rating based only on family size, tobacco use, geographic area, and age but not based on gender, thereby eliminating a long standing discriminatory practice); 42 U.S.C. 300gg-3 (2012) (prohibiting preexisting condition exclusions which were often used to discriminate against women in part because several of the conditions excluded by insurers primarily affect women and because women are more likely than men to suffer from chronic conditions); 45 C.F.R. § 147.104(e) (2015) (prohibiting discrimination in marketing and benefit design, including on the basis of sex).

⁹ See Press Release, Nat'l Women's Law Ctr., *Victory in Sex Discrimination Complaints Brought by NWLC: After Investigation by HHS, Employers Change Policies* (Jan. 26, 2017), <https://nwlc.org/press-releases/victory-in-sex-discrimination-complaints-brought-by-nwlc-after-investigation-by-hhs-employers-change-policies/>.

¹⁰ See *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that a health plan containing a categorical exclusion for all services related to gender transition violated section 1557).

¹¹ See Dania Palanker, *Connecticut Ends Discriminatory Limit on Infertility Coverage*, NAT'L WOMEN'S LAW CTR BLOG (Aug. 14, 2015), <https://nwlc.org/blog/connecticut-ends-discriminatory-limit-infertility-coverage/>.

¹² See Office of Civil Rights, *Enforcement Success Stories Involving Persons with Limited English Proficiency*, HHS.GOV <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/examples/limited-english-proficiency/index.html>.

The Proposed Rule not only threatens these gains – it is a deliberate attempt to reverse them.

II. The Proposed Rule is an unlawful attempt to undermine Section 1557 and permit discrimination in health care.

The Proposed Rule is an unjustified and unlawful attack on core civil rights protections that will open the door to discrimination in health care.

The Proposed Rule:

- Specifically targets sex discrimination protections by unlawfully attempting to add a religious exemption, attempting to incorporate Title IX's abortion provision, and explicitly deleting language that protects against discrimination on the basis of sex stereotyping and gender identity; and
- Attempts to unlawfully allow certain entities to discriminate by narrowing the number of insurance plans covered by Section 1557 and exempting many of the Department's own programs.

The Proposed Rule deletes most of the 2016 Final Rule's substantive provisions, including:

- All of the regulations detailing what forms of discrimination are prohibited under Section 1557;
- All of the regulations specifically detailing what practices constitute discrimination by health insurance issuers;
- Provisions making clear that Section 1557 prohibits actions that have the effect of discriminating in health care.
- The requirement that covered entities provide notice that they do not discriminate on the basis of race, color, national origin, sex, age, or disability;
- The requirement that covered entities make reasonable accommodations to avoid disability discrimination;
- The requirement that covered entities provide equal access to programs on the basis of sex;
- The prohibition against covered entities discriminating against someone because of their relationship to someone in one of the protected classes;
- The prohibition against covered entities providing significant assistance to those who discriminate;
- Provisions making clear that covered entities may be required to take remedial action to overcome the effects of past discrimination and that covered entities may voluntarily take remedial actions on their own;
- The requirement that covered entities designate someone to be responsible for ensuring that the entity is not in violation of Section 1557.

Importantly, the 2016 Final Rule correctly drew upon long-standing civil-rights principles from the underlying statutes to interpret Section 1557's substantive ban and to ensure common enforcement against discrimination in health care. Instead of incorporating the regulations from the referenced statutes wholesale, as the Proposed Rule attempts to do, the 2016 Final

Rule only incorporated those regulations that were consistent with the goals and plain language of Section 1557 and the Affordable Care Act. The 2016 Final Rule did not incorporate any exceptions or other regulations that are particular to the context of the underlying statutes, such as regulations from Title IX that only make sense in the educational context, or that are inconsistent with Section 1557 or the ACA. The 2016 Final Rule also added regulations to ensure consistent protections and enforcement mechanisms for all the protected characteristics and regulations that address discrimination by health insurance issuers, something Section 1557 was specifically intended to eliminate.

The Proposed Rule, in contrast, deletes most of these regulations and attempts to incorporate by reference the regulations for Title VI, Title IX, the Age Act, and Section 504, even those that are contrary to Section 1557's plain language and Congressional intent. It justifies this by claiming that Section 1557 only imposed "the pre-existing understanding of the underlying obligations" of the "civil rights laws referenced by Section 1557."¹³ But this is an improper attempt to narrow Section 1557's scope in a way that is not permitted by the statute. And it will create precisely what Section 1557 was intended to remedy—varying levels of protections and enforcement remedies depending on an individual's protected characteristics. Section 1557 only incorporates the referenced statutes' underlying bases against discrimination and their enforcement mechanisms, not any other parts of those laws.

In order to justify this arbitrary and capricious reversal of policy implemented a mere three years ago, the Department has ignored court precedent, cherry picked facts and ignored the costs that the Proposed Rule would have on public health while improperly amplifying the costs of the 2016 Final Rule to covered entities.¹⁴

The Proposed Rule's reversal in policy is an unlawful, unjustified, arbitrary and capricious attempt to allow discrimination in health care.¹⁵ The Department must withdraw the Proposed Rule in its entirety and fully enforce Section 1557, including the provisions of the 2016 Final Rule.

a. The Proposed Rule Unlawfully Rolls Back the Sex Discrimination Protections in Section 1557

The 2016 Final Rule provides for robust protections against sex discrimination as required by Section 1557's plain language. The Department now attempts to undo these regulations by

¹³ *Proposed Rule*, 84 Fed. Reg. at 27,874.

¹⁴ The 2016 Final Rule was developed over the course of six years and following one request for information and one notice of proposed rulemaking, with over 25,000 comments from stakeholders. Comments overwhelmingly supported the provisions included in the 2016 rule.

¹⁵ A "change [to] existing policies," requires "a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). At minimum, an agency must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* at 2126 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Where an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" or "its prior policy has engendered serious reliance interests," a "detailed justification" for the new position is required. *Fox*, 556 U.S. at 515.

deleting all of the sex specific protections. Instead, the Proposed Rule unlawfully restricts sex discrimination protections to those available under Title IX rather than simply referencing Title IX for the grounds on which it prohibits discrimination. In doing so, the Proposed Rule unlawfully attempts to include provisions specific to Title IX that cannot be applied to Section 1557, including Title IX's religious exemption and abortion provision. The Proposed Rule also eliminates the specific prohibition against discrimination on the basis of sex stereotyping and gender identity that were explicitly protected by the 2016 Final Rule.

In order to justify this arbitrary and capricious policy reversal, the Proposed Rule claims that *Franciscan Alliance, Inc. et al. v. Burwell et al.*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) requires the Department to remove the 2016 Final Rule's definition of "sex" from the 1557 regulations and incorporate Title IX's religious exemption and abortion provisions. In so doing, the Department ignores decades of court precedent interpreting both Title IX's and Title VII's sex discrimination provisions, other court interpretations of Section 1557, Congressional intent, and how the Department's own decision not to defend the 2016 Final Rule in *Franciscan Alliance* predetermined the outcome of the case.¹⁶

i. The Proposed Rule Unlawfully Attempts to Add a Religious Exemption to Section 1557's Prohibition on Sex Discrimination.

The Administration's attempt to incorporate Title IX's religious exemption¹⁷ into Section 1557 is unlawful, contrary to the very purpose of Section 1557, and opens the door to allowing personal beliefs to dictate patient care.

Incorporating a religious exemption into Section 1557's prohibition on sex discrimination is contrary to law. The plain language of Section 1557 makes clear that it is unlawful to incorporate, explicitly or by reference, any exemptions to the non-discrimination protections. Section 1557 references Title VI, Title IX, Section 504, and the Age Act solely for the grounds on which they prohibit discrimination and for their enforcement mechanisms. Section 1557's ban against discrimination in health programs or activities includes a single exception – that it applies "[e]xcept as otherwise provided" in Title I of the ACA. Congress' decision to include "[e]xcept as otherwise provided" makes clear that no other exceptions were intended. In 2016, the Department explicitly declined to incorporate Title IX's religious exemption to Section 1557's implementing regulations.¹⁸

¹⁶ The Department's decision not to appeal the preliminary injunction and then not to defend the regulations at all was, in and of itself, a policy decision that cannot be used now as justification for the Proposed Rule.

¹⁷ In the preamble, the Department explains that the intent of the provision of the proposed rule at issue here (§ 92.6(b)) is to "incorporate by reference statutory exemptions and protections concerning religious and abortion exemptions." 84 Fed. Reg. at 27,864. For clarity, we are mirroring the Department's language in our discussion of § 92.6(b) throughout our comments.

¹⁸ Instead, the Department reiterated that the 2016 Final Rule "would not displace" the application of federal refusal laws. *Final Rule*, 81 Fed. Reg. 31,379.

Section 1557 does not by its terms import any exceptions from Title IX or from any other statute.¹⁹ In addition, as discussed above, several important ACA provisions, including Section 1557, were enacted specifically to correct practices that discriminated on the basis of sex either on their face or in their effect.²⁰ Incorporating a religious exemption that undermines only Section 1557's protections against sex discrimination has the potential to undermine this purpose and violate the Equal Protection Clause of the United States Constitution.²¹

In addition to being unlawful, it is non-sensical and impractical to incorporate Title IX's religious exemption into Section 1557. Title IX's religious exemption is narrowly focused on educational institutions.²² As the Department noted in the 2016 Final Rule, "there are significant differences between the educational and health care contexts that warrant different approaches."²³ Importantly, individuals in either the educational or health care setting may not know whether their school or health care entity has religious objections. Moreover, even if an individual is aware of the religious objections, they may not understand the significant harm such objections could have on them. However, the difference between the two contexts is that an entity's religious objections in the health care setting could mean life or death for a patient. This difference means that applying Title IX's religious exemption has the potential to do even greater harm in the health context, and thus warrants "different approaches" as the 2016 Final Rule concluded.²⁴

Moreover, the Department unlawfully attempts to subordinate Section 1557 to any regulations implementing federal refusal of care laws, including the Department's recent federal refusal rule. Not only does the Department not have statutory authority to do this, but the refusal of

¹⁹ The Proposed Rule is vague and seemingly could be read to incorporate by reference additional religious exemptions, such as the limited exemptions included in Title VII and the ADA. Incorporating these provisions is not only unlawful, it makes no sense in the statutory scheme of Section 1557 or in the health care context.

²⁰ See *supra* note 8 (citing 42 U.S.C. 300gg(a) (2012); 42 U.S.C. 300gg-3 (2012); 45 C.F.R. § 147.104(e) (2015)).

²¹ By creating a religious exemption only to Section 1557's protections against sex discrimination that has the purpose and effect of cherry picking people who have had or are seeking abortions, transgender individuals, and gender nonconforming people from the law's protections, the Proposed Rule creates impermissible classifications based on sex and the exercise of a fundamental right that cannot withstand the exacting scrutiny required by the Equal Protection guarantee of the Fifth Amendment of the U.S. Constitution.

²² See *Nondiscrimination in Health Programs and Activities*, 80 Fed. Reg. at 54,173. Title IX's exceptions for social fraternities or sororities, scholarship awards in beauty pageants, and Girls State conferences, for example, are irrelevant at best in the context of Section 1557. See 20 U.S.C. § 1681(a)(6), (7), (9).

²³ *Final Rule*, 81 Fed. Reg. at 31,380.

²⁴ Further, the Department of Education is currently attempting to alter Title IX's religious exemption regulations by removing the requirement that funding recipients notify the Department of Education in writing and identify which Title IX provisions conflict with their religious beliefs. See *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,496 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106.12(b)). This proposed change would allow schools to conceal their intent to discriminate and expose students to harm. If the same no-prior-notice rule would apply in the health care context, the consequences of allowing hospitals concealing the intent to discriminate against patients seeking treatment could be far more severe, and a matter of life or death.

care rule is itself currently being challenged in court by numerous stakeholders as illegal and discriminatory.²⁵

The potential harm of a religious exemption cannot be overstated. Providers have invoked personal beliefs to deny access to health insurance and an increasingly broad range of health care services, including birth control,²⁶ sterilization,²⁷ certain fertility treatments,²⁸ abortion,²⁹ transition-related care for transgender individuals,³⁰ and end of life care.³¹ For example, one woman experiencing pregnancy complications was rushed to the only hospital in her community, a religiously-affiliated facility, where she was denied the miscarriage management she needed because the hospital objected to this care.³² A transgender man was denied gender affirming surgery at a religiously-affiliated hospital that refused to provide him a hysterectomy.³³ A woman called an ambulance after experiencing abdominal pain, but the ambulance driver refused to take her to get the care she needed at an abortion clinic.³⁴ Women of color – and black women in particular – are at higher risk since they are more likely than white women to seek reproductive health care and pregnancy-related care at religious-affiliated medical institutions,³⁵ and more likely to experience pregnancy-related complications that require services or procedures prohibited in certain religiously-affiliated health care institutions.³⁶

²⁵ See *New York et al. v. U.S. Dep't Health & Human Servs.*, No. 1:19-cv-4676-PAE (S.D.N.Y.); *Planned Parenthood Federation of America, Inc. et al. v. Azar*, No. 1:19-cv-5433-PAE (S.D.N.Y.); *National Family Planning and Reproductive Health Assoc. et al. v. Azar*, No. 1:19-cv-5435-PAE (S.D.N.Y.); *California v. Azar*, 3:19-cv-02769-WHA (N.D. Cal.); *City & County of San Francisco v. Azar*, No. 3:19-cv-2405-WHA (N.D. Cal.); *County of Santa Clara et al. v. U.S. Dep't Health & Human Servs.*, No. 5:19-cv-2916-WHA (N.D. Cal.); *Washington v. Azar*, No. 2:19-cv-00183-SAB (E.D. Wash.); *Mayor & City Council of Baltimore v. Azar*, 1:19-cv-01672-GLR (D. Md.).

²⁶ Nat'l Women's Law Ctr., *Health Care Refusals Harm Patients: The Threat to Reproductive Health Care* (May 2014), http://www.nwlc.org/sites/default/files/pdfs/refusals_harm_patients_repro_factsheet_5-30-14.pdf.

²⁷ See Nat'l Women's Law Ctr., *supra* note 26.

²⁸ See Nat'l Women's Law Ctr., *supra* note 26.

²⁹ See Nat'l Women's Law Ctr., *supra* note 26.

³⁰ Nat'l Women's Law Ctr., *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS* (May 2014), http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf.

³¹ U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, (5th ed. 2009) (directive 24 denies respect for advance medical directives), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

³² See Nat'l Women's Law Ctr., *supra* note 26.

³³ See Complaint for Declaratory, Compensatory, and Injunctive Relief, *Conforti v. St. Joseph's Healthcare System*, No. 2:17-CV-00050 (D.N.J. Jan. 5, 2017).

³⁴ Nat'l Women's Law Ctr., *Put Patient Health First* (August 2017), <https://nwlc.org/resources/continued-efforts-to-undermine-womens-access-to-health-care/>.

³⁵ See Kira Shepherd et al., *Bearing Faith: The Limits of Catholic Health Care for Women of Color*, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (Nov. 9, 2019), <https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/bearingfaith.pdf>.

³⁶ For example, Black women experience complications such as preeclampsia, fibroids, eclampsia, embolisms, fetal death, and miscarriage at a higher rate than white women. See NAT'L PARTNERSHIP FOR WOMEN AND FAMILIES, *BLACK WOMEN'S MATERNAL HEALTH* (Apr. 2018), <http://www.nationalpartnership.org/our-work/health/reports/black-womens-maternal-health.html>. In some cases, ending the pregnancy might be the best way to preserve a woman's

Indeed, as the Department acknowledged in the 2016 Final Rule, a religious exemption “could result in a denial or delay in the provision of health care to individuals and in discouraging individuals from seeking necessary care, with serious and, in some cases, life threatening results.”³⁷ Yet, the Department now is unlawfully reversing course without providing any analysis on the potential impact of a religious exemption on health care or coverage or any reasoning that would alter the conclusion made in 2016 that it will cause substantial harm. This failure is both arbitrary and capricious and raises serious Establishment Clause concerns.³⁸ Moreover, the Department fails entirely to address the arguments it put forth in the 2016 Final Rule to justify this reversal of policy. The Administration points to *Franciscan Alliance* but, as discussed above, the Department cannot abdicate its legal duties under the Administrative Procedure Act and the Constitution to one judicial decision that stands in stark contrast to other court interpretations of the law, particularly after failing to defend the 2016 Final Rule in court.³⁹

life, health, or future fertility. Yet, as found in one study some doctors at Catholic hospitals have reported being required to deny medically-indicated uterine evacuations or abortion care even during emergencies, either transferring patients to another hospital while they are unstable or waiting until their medical condition becomes critical. See Shepherd et al., *supra* note 35; Lori R. Freedman et al., *When There’s a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98,10 AM. J. PUBLIC HEALTH 1774 (2008) (stating, “[t]he experiences of physicians in our study indicate that uterine evacuation may not be approved during miscarriage by [a Catholic hospitals’] ethics committee if fetal heart tones are present and the pregnant woman is not yet ill, in effect delaying care until fetal heart tones cease, the pregnant woman becomes ill, or the patient is transported to a non-Catholic owned facility for the procedure”). The study further found that other doctors felt limited in their ability to appropriately treat patients with risky tubal/ectopic pregnancies; according to at least one provider at a Catholic hospital, such refusals have led to tubal rupture.

³⁷*Final Rule*, 81 Fed. Reg. at 31,380. See also Shepherd et al., *supra* note 35. Additionally, patients described being discharged from the emergency room without treatment while miscarrying and being forced to continue a nonviable pregnancy.

³⁸ The Establishment Clause of the First Amendment requires the government to adequately account for just these sorts of consequences when considering whether to grant religious exemptions and, in fact, bars granting an exemption when it would detrimentally affect any third party. See U.S. Const. amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries” and must ensure that the accommodation is “measured so that it does not override other significant interests”) (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

³⁹ The Administration also points to several so-called “exceptions” in the 2016 Final Rule in an attempt to justify this decision. But, the so-called “exceptions” from Title VI, Section 504, and the Age Act set out at 45 C.F.R. §§ 80.3(d), 84.4(c), 85.21(c), 91.12-.15, 91.17-.18 (2015), incorporated into the 2016 Final Rule and cited in the Proposed Rule by and large do not actually set out exceptions from the relevant antidiscrimination mandates. Rather, they clarify that certain programs targeted to meet the particular needs of specific protected groups within the protected class are not properly considered discrimination. This is different in kind from creating a sweeping exemption that could allow a large number of religiously-affiliated hospitals and health care providers to discriminate.

ii. *The Proposed Rule unlawfully targets abortion.*

The Department is using the Proposed Rule to target abortion and allow discrimination against people seeking reproductive health care, contrary to the express purpose of Section 1557 to end discrimination in health care. The Department improperly purports to incorporate Title IX's so-called "abortion neutrality provision" (the Danforth Amendment)⁴⁰—statutory language neither mirrored nor cross referenced by Section 1557. The Department's interpretation is simply not permissible given Section 1557's plain language. Once again, this attempt to cherry pick Title IX's provisions is contrary to Congress's express limitation in Section 1557, which provides that the only applicable exceptions are those "otherwise provided in Title I" of the ACA. Moreover, Section 1557 only incorporates the referenced statutes' underlying bases against discrimination (in this case "sex") and their enforcement mechanisms, not any other parts of the law. And as courts have consistently held, discrimination on the basis of sex includes discrimination because someone has had or is seeking an abortion.⁴¹

In addition, as the Department acknowledges, Title IX's regulations clearly and unequivocally state that discrimination on the basis of sex includes discrimination on the basis of "termination of pregnancy." At a minimum, Title IX prohibits denying someone care or harassing someone because they have had or are seeking an abortion.⁴² Yet despite this prohibition in Title IX, the Department refuses to say whether it would, in fact, enforce those protections.⁴³ Indeed, the Department even refuses to say whether it believes that Section 1557 protects against discrimination because someone is miscarrying or seeking care after having an abortion. This could encourage health care providers to unlawfully deny someone necessary care for miscarriage or ectopic pregnancy, care that is the medical standard, or to refuse to treat someone because they have had an abortion.

Not only does the Department's refusal to commit to enforcing protections against discrimination because someone has had or is seeking an abortion or is experiencing pregnancy

⁴⁰ The Danforth Amendment states, "[n]othing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." 20 U.S.C. § 1688 (Mar. 22, 1988) (clearly prohibiting denying someone care or harassing someone because they have had or are seeking an abortion).

⁴¹ See, e.g., *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983) (holding the PDA makes it clear that "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that Title VII as amended by the PDA protects women against discrimination based on their decision to have an abortion); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (holding that discharge of pregnant employee because she contemplated having an abortion procedure violated Title VII as amended by the PDA); *Ducharme v. Crescent City Deja Vu, L.L.C.*, No. CV 18-4484, 2019 WL 2088625, at *5 (E.D. La. May 13, 2019) (holding that abortion is protected by the pregnancy language of Title VII).

⁴² The Danforth Amendment creates a carve out from Title IX's sex discrimination rule to require neutrality as to payment for abortion or provision of abortion.

⁴³ *Proposed Rule*, 84 Fed. Reg. 27,870, n. 159.

complications embolden this type of discrimination, but it also is in direct conflict with the purpose of the underlying statute. Moreover, by allowing providers to impede access to critical health care, including emergency care, and by interfering with patients' ability to obtain abortions necessary to preserve their health or life, the Proposed Rule runs afoul of several federal laws, including Section 1554 of the ACA, 42 U.S.C. § 18114,⁴⁴ and the Emergency Medical Treatment & Labor Act (EMTALA),⁴⁵ and the rights to privacy, liberty, and equal protection under the law enshrined in the U.S. Constitution.

iii. The Proposed Rule improperly seeks to delete the explicit prohibition against sex stereotyping and gender identity discrimination.

The Proposed Rule seeks to enshrine a definition of sex that refers merely to the biological differences between men and women by deleting the explicit protections against discrimination on the basis of gender identity and sex stereotyping from the Proposed Rule. Such an interpretation is flatly inconsistent with longstanding legal interpretations of sex discrimination and its harms. The overwhelming majority of courts that have been presented with the question of whether federal antidiscrimination laws that prohibit sex discrimination such as Section 1557 specifically prohibit anti-transgender discrimination have firmly ruled that they do.⁴⁶ By only focusing on one district court case to justify removing gender identity and sex

⁴⁴ Section 1554 of the ACA prohibits the Department from promulgating any regulation that “(1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services; (3) interferes with communications regarding a full range of treatment options between the patient and the provider; (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions; (5) violates the principles of informed consent and the ethical standards of health care professionals; or (6) limits the availability of health care treatment for the full duration of a patient’s medical needs.” 42 U.S.C. § 18114. By empowering health care providers to restrict access to health services and discriminate in the provision of health care, the Proposed Rule is irreconcilable with the plain language of 42 U.S.C. § 18114.

⁴⁵ To the extent the Proposed Rule would allow providers to deny care in emergency situations, it is not in accordance with the Emergency Medical Treatment & Labor Act (EMTALA), which requires that a hospital treat someone experiencing an emergency complication, such as an ectopic pregnancy or other medical complication. 42 U.S.C. § 1395dd (federal law requiring hospital emergency departments to medically screen every patient who seeks emergency care and to stabilize or transfer those with medical emergencies, regardless of health insurance status or ability to pay). Yet, religiously affiliated hospitals have denied women appropriate miscarriage management or treatments for ectopic pregnancies. *See, e.g., Means v. United States Conference of Catholic Bishops*, 836 F.3d 643, 646-6477 (6th Cir. 2016) (patient experiencing severe pregnancy complications at 18 weeks sought care at a Catholic hospital and was sent home twice and told there was nothing the hospital could do even though she was in excruciating pain and terminating the pregnancy was an option and the safest course for her condition). The rule would only exacerbate the incidence of such denials of emergency care.

⁴⁶ *See, e.g., Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep’t of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program’s refusal to cover treatments related to gender transition is “text-book discrimination based on sex” in violation of the Affordable Care Act and the Equal Protection Clause of the Constitution); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding exclusion invalid under the Medicaid Act and the Affordable Care Act); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia*

stereotyping from the definition of sex, the Department improperly seeks to erase 30 years of court precedent.

Since the enactment of Title VII of the Civil Rights Act of 1964, courts have shared a common understanding of discrimination on the basis of “sex” that broadly includes discrimination based on the assumptions and stereotypes about how members of a sex—or of a subset of a sex—should behave.⁴⁷ In *Price Waterhouse*, which held that Title VII prohibits discrimination against employees based on their failure to conform to a sex stereotype, the Supreme Court clarified that, even in 1989, it was “tread[ing] [a] well-worn path,” not “travers[ing] new ground.”⁴⁸ In so holding, the Supreme Court reaffirmed that sex stereotyping is a central harm of sex discrimination because enforcement of such stereotypes closes opportunity, depriving individuals of their essential liberty to depart from gender-based expectations. For decades, the courts have recognized prohibitions on sex discrimination include discrimination based on sex stereotypes relating to perceived personal, familial, or romantic relationships.⁴⁹ Courts have recognized, for example, that Title VII prohibits discrimination based on sex stereotypes related

Health, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause); *Gavin Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054-AWA-RJK, Docket # 229 (E.D. Va. Aug. 9, 2019) (holding school board violated Title IX and Equal Protection Clause by forcing transgender student to use bathroom inconsistent with his gender identity).

⁴⁷ See, e.g., *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197–1202 (7th Cir. 1971) (invalidating airline policy of employing only unmarried female flight attendants); *Allen v. Lovejoy*, 553 F.2d 522, 524–25 (6th Cir. 1977) (invalidating State Health Department rule requiring newly married female employees to take on their husbands’ last names); see generally, *Am. Newspaper Publishers Ass’n v. Alexander*, 294 F. Supp. 1100, 1102–03 (D.D.C. 1968) (invalidating “help wanted” advertisements bifurcated into male and female sections).

⁴⁸ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248, 259 (1989).

⁴⁹ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (Equal Protection case striking down sex classification based on assumptions about women’s appropriate role in the family, decrying discrimination based on “gross, stereotyped distinctions between the sexes”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that gender-based classification in the Social Security Act that provided dissimilar treatment to similarly situated men and women based on a “gender-based generalization” was unconstitutional); *Califano v. Goldfarb*, 430 U.S. 199, 216–17 (1977) (holding that the differential treatment of widows and widowers based on “archaic and overbroad generalizations” was unconstitutional). Indeed, a finding to the contrary in *Price Waterhouse* would have contradicted decades of jurisprudence and EEOC guidance, rejecting courts’ repeated recognition that limiting opportunities based on sex stereotypes is among the core harms of sex discrimination.

to an employee's personal and family life.⁵⁰ Title VII also protects against adverse employment decisions based on perceptions about an employee's sexual relationships.⁵¹

Similarly, courts have consistently held that Title IX's sex discrimination protections include protections against sex stereotyping and gender identity discrimination.⁵² Congress was also specifically concerned with eradicating pernicious sex stereotyping in education when enacting Title IX. When introducing Title IX, Senator Bayh expressly recognized that sex discrimination in education is based on "stereotyped notions," like that of "women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again."⁵³ Title IX was therefore necessary to "change [these] operating assumptions" so as to combat the "vicious and reinforcing pattern of discrimination" based on these "myths."⁵⁴

⁵⁰ See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (invalidating policy of not hiring mothers of preschool-aged children); *Chadwick v. WellPoint*, 561 F.3d 38, 47 (1st Cir. 2009) (holding that a reasonable jury could infer that an employee was denied a promotion because her employer "assumed that as a *woman* with four young children, [she] would not give her all to her job"); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004) (impermissible sex stereotyping where employer fired school psychologist based on beliefs that "a woman cannot 'be a good mother' and have a job that requires long hours," and "would not show the same level of commitment [she] had shown because [she now] had little ones at home"); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (same where employer admitted that he didn't promote the plaintiff "because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that," and he had inquired as to "why [the employee's husband] wasn't going to take care of her"); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (same where direct supervisor questioned "whether [the plaintiff] would be able to manage her work and family responsibilities").

⁵¹ In *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297 (4th Cir. 2019), the Fourth Circuit held that a female employee was discriminated against when she was fired based on "an unfounded, sexually-explicit rumor about her that falsely and maliciously portrayed her as having [had] a sexual relationship with a higher-ranking manager . . . in order to obtain her management position." *Id.* at 300 (internal quotations omitted).

⁵² *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (explaining that harassment claims premised on antigay epithets and plaintiff's alleged failure to conform to gender stereotypes could proceed to trial under Title IX's sex discrimination prohibition); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (holding plaintiff stated Title IX sex discrimination claim because he alleged fellow students targeted him "not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity").

⁵³ 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh).

⁵⁴ The recognition of stereotypes as a core problem motivating sex discrimination in education also permeated the 1970 Hearings that led to the adoption of Title IX. Numerous individuals testified to the harmfulness of stereotypes—in particular, those regarding gender roles—in perpetuating inequality. See, e.g., 1970 Hearings at 7 (statement of Myra Ruth Harmon, President, Nat'l Fed'n of Bus. & Prof'l Women's Clubs, Inc.) (discussing "certain sex role concepts which continue to mold our society," including in "educational institutions"); *id.* at 135 (statement of Wilma Scott Heide, Comm'r, Pa. Human Rel. Comm'n) (discussing danger of sex role stereotyping); *id.* at 436 (statement of Daisy K. Shaw, Dir. of Educ. & Vocational Guidance of N.Y.C.) (discussing how "perceptions of sex roles develop" very early in life, and what is needed to end sex discrimination is "thoroughgoing reappraisal of the education and guidance of our youth to determine what factors in our own methods of child rearing and schooling are contributing to this tragic and senseless underutilization of American women"); *id.* at 662 (statement of Frankie M. Freeman, Comm'r, U.S. Comm'n on Civil Rights) ("Because of outmoded customs and attitudes, women are denied a genuinely equal opportunity to realize their full individual potential * * *"); *id.* at 364 (statement of Pauli Murray, Professor, Brandeis Univ.) (discussing importance of treating each person as an

The Department also ignores circuit⁵⁵ and district court⁵⁶ cases throughout the country that have determined that federal sex discrimination laws prohibit discrimination on the basis of a person's gender identity or transgender status. Discrimination against transgender individuals rests in large part on sex-stereotyping—that a transgender person is not a “real man” or a “real woman” because they do not conform to stereotypes about what it means to be male or female. Further, discrimination against transgender individuals because they are transgender is inherently discrimination on the “basis of sex” because transgender people are treated differently because their gender identity and sex identified at birth do not match. Thus, for all the reasons discussed above, gender identity discrimination is sex discrimination.

In a footnote, the Department advances the transphobic—and legally erroneous—position that policies “that result in unwelcome exposure to, or by, persons of the opposite biological sex where either party may be in a state of undress—such as in changing rooms, shared living quarters, showers, or other shared intimate facilities—may trigger hostile environment concerns under Title IX.”⁵⁷ The Department cites *United States v. Virginia*,⁵⁸ and *Fortner v.*

individual, and not according to a group). See Brief of *Amici Curiae* Nat'l Women's Law Ctr., et al., in Support of Respondent at 18-19, *Gloucester County Sch. Board v. G.G.*, 136 S.Ct. 2442 (2016).

⁵⁵ See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (holding that termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Dodds v. U.S. Dep't. of Education*, 845 F.3d 217 (6th Cir. 2016) (same); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that termination of employee based on gender transition, transgender status, and unsubstantiated “bathroom concerns” constitutes sex-based discrimination in violation of the Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (same); *Rose v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that refusal to serve transgender customer constitutes sex-based discrimination under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that the Gender Motivated Violence Act (GMVA) applied to targeting of a transgender person).

⁵⁶ See, e.g., *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018); *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y. 2016); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. Sept. 27, 2017); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018); *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Gavin Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054-AWA-RJK, Docket # 229 (E.D. Va. Aug. 9, 2019) (Title IX and Equal Protection Clause); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. March 12, 2018).

⁵⁷ Proposed Rule, 84 Fed. Reg. at 27,874, n.179.

⁵⁸ 518 U.S. 515 (1996) (finding that an all-male military school violated the Equal Protection Clause by refusing to admit women).

Thomas,⁵⁹ as support for its claim. Neither of these cases bear any relation to the question of whether allowing transgender individuals to use the bathrooms of their choice could create a hostile environment under Title IX. And in citing these irrelevant and inapposite cases, the Department ignores legal precedent finding that allowing transgender individuals to use private facilities that match their gender identity *does not* violate Title IX.⁶⁰

The Department's reasoning is steeped in transphobic rhetoric that relies on faulty information and has no place in federal regulations. The Supreme Court has made clear that exclusionary policies that use a pretextual interest in protecting women or other groups instead operate principally to disadvantage the disfavored groups and are, thus, discriminatory.⁶¹ Policies that allow transgender people to use the correct facilities and bathrooms do not legalize harassment, stalking, violence, or sexual assault as the rule claims.⁶² Those behaviors are, and will continue to be, against the law for anyone, anywhere. Everyone—including transgender people—should be treated equally under the law. And there is no evidence that allowing transgender students to use bathroom facilities that correspond to their gender identity puts anyone else at risk.⁶³ The Department is attempting to use Section 1557 to embolden discrimination by claiming that allowing transgender individuals to use facilities that correspond to their gender identity could harm others' rights under the law. This position is not supported by the facts nor is it supported by the law. To insist that sex does not encompass gender

⁵⁹ 983 F.2d 1024 (1993) (holding that state inmates have a constitutional right to bodily privacy).

⁶⁰ See *Doe by and through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018) (finding that a school district's policy allowing "all students to use bathrooms and locker rooms that align with their gender identity...does not discriminate based on sex, and therefore does not offend Title IX); cf. *Cruzan v. Special Sch. Dist.*, 294 F.3d 981 (8th Cir. 2002) (finding that inclusive bathroom policy did not create a hostile work environment under Title VII). The Department also ignores the numerous cases holding that *refusing* to allow transgender individuals to use facilities that match their gender identity violates Title IX, Title VII, and the Equal Protection Clause of the U.S. Constitution. See, e.g., *Gavin Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054-AWA-RJK, Docket # 229 (E.D. Va. Aug. 9, 2019) (Title IX and Equal Protection Clause); *Adams v. School Board of St. Johns Cty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (Title IX); *A.H. ex rel Handling v. Minersville Area Sch. Dist.*, No. 3:17-cv-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (Title IX and the Equal Protection Clause); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (Equal Protection Clause); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388, 2016 WL 5843046 (D. Nev. Oct. 4, 2016) (Title VII); *Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016) (Title IX and Equal Protection Clause).

⁶¹ See *Johnson Controls* 499 U.S. 187, 190 (1991); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (holding that abortion laws justified as protections for women's health and safety violated women's liberty when the burdens they imposed outweighed their benefits).

⁶² Letter from the Nat'l Women's Law Ctr. and 114 organizations to Roger Severino, et al. (November 1, 2018) (discussing the HHS proposal to erase transgender, non-binary, and intersex people from civil rights protections), <https://nwlc.org/resources/nwlc-and-114-survivor-advocacy-organizations-writes-doj-hhs-ed-and-dol-condemning-any-proposal-to-remove-civil-rights-protections-for-transgender-people/>.

⁶³ See, e.g., Nat'l Ctr. for Transgender Equality, *What Experts Say* (citing sexual assault prevention experts asserting that protecting transgender rights does not compromise safety in restrooms), <https://transequality.org/what-experts-say>; Amira Hasenbush, Andrew Flores, & Jody Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, SEXUALITY RESEARCH AND SOCIAL POL'Y (July 2018) (finding no link between trans-inclusive policies and bathroom safety), <https://link.springer.com/article/10.1007%2Fs13178-018-0335-z>.

identity is contrary to the views of the American Medical Association⁶⁴, the American Academy of Pediatrics⁶⁵, the American Psychological Association⁶⁶, the American Psychiatric Association⁶⁷, and countless doctors, counselors, psychologists, psychiatrists, and social workers across the nation. This is why in the most recent transgender rights cases briefed at the Supreme Court, more than 20 of the nation's leading medical, mental health, and health care organizations submitted amicus briefs in support of transgender employees' rights.⁶⁸ In short, the 2016 Final Rule correctly interpreted court decisions and up-to-date medical research to support a definition of sex that includes gender identity and sex stereotyping and that definition should not be altered by this Proposed Rule.

The Department has provided no justification for its effort to eliminate protections against sex stereotyping and gender identity from the regulations other than its own stated change in position and one preliminary injunction from a single district court case in Texas. But the Department cannot change the law, and the attempt to eliminate the protections from the regulations is impermissible. By removing the definition of sex and supporting the *Franciscan Alliance* court's erroneous conclusion that "sex" refers only to "the biological and anatomical differences between male and female students as determined at their birth," the Proposed Rule improperly seeks to impose a static understanding of sex discrimination that ignores not only how society has evolved and changed but also over 30 years of legal precedent.

To erase protections against sex stereotyping and gender identity discrimination willfully ignores the very real and harmful impact such discrimination has on LGBTQ individuals in this

⁶⁴ See Robert Nagler Miller, *AMA Takes Several Actions Supporting Transgender Patients*, AMER. MED. ASSOC. (June 12, 2017), <https://wire.ama-assn.org/ama-news/ama-takes-several-actions-supporting-transgender-patients>.

⁶⁵ See Press Release, Amer. Acad. of Pediatrics, *AAP Policy Statement Urges Support and Care of Transgender and Gender-Diverse Children and Adolescents* (Sept. 17, 2018), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAP-Policy-Statement-Urges-Support-and-Care-of-Transgender-and-Gender-Diverse-Children-and-Adolescents.aspx>.

⁶⁶ Nat'l LGBTQ Task Force, *American Psychiatric Association Officially Supports Equality in Transgender Health*, (last visited July 31, 2019), <http://www.thetaskforce.org/american-psychiatric-association-officially-supports-equality-in-transgender-health/>.

⁶⁷ Am. Psychiatric Assoc., *Help with Gender Dysphoria* (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria>.

⁶⁸ *E.g.*, Brief for American Psychological Association et al. as Amici Curiae in Support of the Employees, *Bostock v. Clayton Cty.* (No. 17-1618), *Altitude Express, Inc. v. Zarda* (No. 17-1623), and *R.G. & G.R. Harris Funeral Homes, Inc.* (No. 18-107) (transgender employees' rights supported by American Psychological Association, American Psychiatric Association, American Association for Marriage and Family Therapy, Georgia Psychological Association, Michigan Psychological Association, and New York State Psychological Association); Brief for American Medical Association et al. as Amici Curiae in Support of the Employees, *Bostock v. Clayton Cty.* (No. 17-1618), *Altitude Express, Inc. v. Zarda* (No. 17-1623), and *R.G. & G.R. Harris Funeral Homes, Inc.* (No. 18-107) (transgender employees' rights supported by American Medical Association, American Nurses Association, American Public Health Association, AGLP: Association of LGBTQ Psychiatrists, Association of Medical School Pediatric Department Chairs, Endocrine Society, GLMA: Health Professions Advancing LGBTQ Equality, LGBT Physician Assistant Caucus, Medical Association of Georgia, Mental Health America, Michigan State Medical Society, National Council for Behavioral Health, Pediatric Endocrine Society, Society for Physician Assistant in Pediatrics, and World Professional Association for Transgender Health).

country. LGBTQ individuals already encounter high rates of discrimination in health care. According to one survey, eight percent of lesbian, gay, bisexual, and queer individuals had an experience within the year prior to the survey where a doctor or other health care provider refused to see them because of their actual or perceived sexual orientation and seven percent experienced unwanted physical contact and violence from a health care provider.⁶⁹ Twenty-nine percent of transgender individuals were refused to be seen by a health care provider on the basis of their perceived or actual gender identity in the previous year.⁷⁰

The effects of discrimination on access to care are clear. In a 2016 study, over thirty percent of transgender participants delayed or did not seek needed health care due to discrimination.⁷¹ When they were sick or injured, twenty-eight percent of respondents postponed medical care due to discrimination.⁷² Among LGBTQ people who reported having experienced discrimination in the past year, over eighteen percent reported avoiding doctor's offices to avoid discrimination, nearly seven times the rate of LGBTQ people who had not experienced discrimination in the past year.⁷³

Emboldening providers to deny care due to a person's gender identity will hit hardest those already experiencing the effects of racial discrimination. Lesbian, gay, bisexual, and queer people are more likely to be non-white.⁷⁴ Specifically, adults who identify as transgender are less likely to be white and more likely to be racial and ethnic minorities when compared to the U.S. general population.⁷⁵ These groups report discrimination at higher rates.⁷⁶

The Proposed Rule's attempt to literally erase these protections will encourage more of this discrimination.

⁶⁹ See Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018, 9:00 AM), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

⁷⁰ See Mirza & Rooney, *supra* note 69.

⁷¹ See K.D. Jaffee et al., *Discrimination and Delayed Health Care Among Transgender Women and Men: Implications for Improving Medical Education and Health Care Delivery*, MED. CARE, vol. 54(11), 1010 (Nov. 2016).

⁷² See Jamie M. Grant, Ph.D. et al., *National Transgender Discrimination Survey Report on Health and Health Care* (Oct. 2010), https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf

⁷³ See Mirza & Rooney, *supra* note 69.

⁷⁴ See Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>

⁷⁵ See Andrew R. Flores et al., *Race and Ethnicity of Adults Who Identify as Transgender in the United States*, UNIV. OF CAL. WILLIAMS INST. (Oct. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf>

⁷⁶ See Flores et al., *supra* note 75.

b. The Proposed Rule unlawfully tries to allow more entities to discriminate.

Despite the fact that Section 1557 was enacted to “ensure[s] that all Americans are able to reap the benefits of health insurance reform equally without discrimination,”⁷⁷ the Proposed Rule takes steps to expand discrimination in health care.

i. The Proposed Rule would allow insurers to discriminate.

The Department seeks to delete all of the provisions detailing the specific discriminatory actions prohibited by insurance companies and to unlawfully exempt most health insurance issuers from having to comply with Section 1557.

The 2016 Final Rule correctly makes clear that if a health insurance issuer receives federal financial assistance then all of the issuer’s plans, including those that do not receive federal financial assistance directly, are covered by Section 1557, just as an educational institution is covered by Title IX in regard to all of its operations if it receives any federal financial assistance.⁷⁸ Thus, the 2016 Final Rule adopted the well-known—and widely-accepted—structure of the Spending Clause antidiscrimination statutes as amended by the Civil Rights Restoration Act (CRRA). It did not, as the Proposed Rule claims, expand or abrogate the CRRA.

In contrast to the 2016 Final Rule, the Proposed Rule tries to subvert both the text and purpose of the CRRA by stating that Section 1557 will only apply to the specific “operations” of a covered entity that directly receive federal financial assistance if they are “principally engaged in the business of providing health care.”⁷⁹ Thus, under the Proposed Rule only those health plans that receive federal financial assistance directly—primarily plans that receive subsidies in the Health Insurance Marketplaces and Medicare HMOs—would be required to comply with Section 1557. This would exempt large numbers of health insurance plans that are currently

⁷⁷ 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (emphasis added).

⁷⁸ *E.g., Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171, n. 3 (3d Cir. 1993) (“Although the School District initially argued in the district court that title IX does not apply to athletic programs that do not themselves receive federal funds, it eventually conceded, correctly, that title IX applies whenever any part of an educational program receives federal funding, which is the case here.” (referencing Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988)); *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 271 (6th Cir. 1994) (italicizing “any part of which” and stating: “The legislative history describes the effect of the amendments, stating that the definitions of ‘program or activity’ and ‘program’ ‘make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance.’” (citing S.Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S.C.C.A.N. 3, 6)); *O’Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997) (“Following the 1988 Amendment [of the CRRA], courts have consistently interpreted Title IX to mean that if one arm of a university or state agency receives federal funds, the entire entity is subject to Title IX’s proscription against sex discrimination.”); *Klinger v. Dep’t of Corrections*, 107 F.3d 609, 615 (1997) (“In other words, the purpose of § 1687 [of Title IX, as amended by the CRRA] was ‘to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance.’” (citing S.Rep. No. 100–64, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 6.)).

⁷⁹ *Proposed Rule*, 84 Fed. Reg. at 27,891 (proposed § 92.3).

covered because their issuers receive federal financial assistance even though the plan does not.

This is inconsistent with both the CRRA and Section 1557. The CRRA defines “program or activity” to include a wide variety of entities—not just those principally engaged in the business of providing health care, “any part of which is extended Federal financial assistance.”⁸⁰ However, even if the Department were correct in its reading of the CRRA, it would be absurd to claim that health insurance issuers are not health programs covered by Section 1557. As part of the ACA, Section 1557 was clearly intended to reach all the operations of health insurance issuers who receive federal financial assistance. Further, courts have made clear that an entity need not be directly involved in patient care to be considered principally engaged in providing health care.⁸¹

In addition, by deleting the specific provisions relating to health insurance coverage,⁸² the Proposed Rule will embolden discrimination. For example, covered plans would no longer be explicitly prohibited from employing discriminatory benefit designs to discourage enrollment by persons with significant health needs. This could have a profound effect on people with disabilities, chronic health conditions, people who are older, and women, who often have higher health costs. This provision has been crucial in stopping insurers from placing all or most prescription drugs used to treat a specific condition, such as HIV prescriptions, on a plan’s most expensive tier.⁸³

Similarly, the Proposed Rule would eliminate the regulation that prohibits issuers from using discriminatory marketing practices, such as those “designed to encourage or discourage

⁸⁰ Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, and 42 U.S.C.). Section 1557’s prohibition of discrimination in any “program or activity receiving Federal financial assistance” must be read to include the definition imported by the CRRA. These statutes thus apply, as set out in the CRRA, to any “program or activity”—defined as the types of entities listed in the CRRA—“any part of which is extended Federal financial assistance.” Those entities are not limited to entities “principally engaged in the business of providing health care.” See 20 U.S.C. § 1687(1-3) (“For the purposes of this chapter, the term ‘program or activity’ and ‘program’ mean all the operations of...a department, agency, special purpose district, or other instrumentality of a State or of a local government...a college, university, or other postsecondary institution...a local education agency...an entire corporation, partnership, or other private organization, or an entire sole proprietorship... or the entire plant or other comparable, geographically separate facility...any part of which is extended Federal financial assistance”).

⁸¹ See, e.g., *Dorer v. Quest Diagnostics Inc.*, 20 F. Supp. 2d 898, 900 (D. Md. 1998) (holding a laboratory which provided clinical diagnostic testing and received Medicare and Medicaid was principally engaged in providing health care); *Zamora-Quezada v. HealthTexas Med. Grp. of San Antonio*, 34 F. Supp. 2d 433, 444 (W.D. Tex. 1998) (explaining that a health care delivery system was fueled by the financial arrangements of an insurance company, and thus the insurance company controlled the delivery of health care and caused the discrimination patients experienced).

⁸² In addition to this provision, the Proposed Rule would also delete prohibitions against insurers.

⁸³ MaryBeth Musumeci et al., *HHS’s Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), <https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/>.

particular individuals from enrolling in certain health plans.”⁸⁴ As the Department explained in the 2016 Final Rule “such practices would include, for example, any activity of a covered entity that is designed to encourage individuals to participate or enroll in the covered entity’s programs or services or to discourage them from doing so, and activities that steer or attempt to steer individuals towards or away from a particular plan or certain types of plans.”⁸⁵ Eliminating these regulations will encourage insurance companies to try to cut costs by engaging in these discriminatory practices. These protections have been lifesaving for many people.

ii. The Proposed Rule attempts to allow the Department to discriminate.

Section 1557 states clearly that it applies to “any program or activity that is administered by an Executive Agency.” Nothing in the plain language of the statute or legislative history would permit any other reading. Yet, despite this plain language, the Department tries to claim the prohibition against discrimination by programs or activities administered by an executive agency only applies to those programs created by Title I of the ACA. The Department, thus, seeks to allow discrimination in federally run programs such as Medicare, Medicaid, the Children’s Health Insurance Program, and federal research programs. But the Department cannot just decide it is no longer bound by the law in the programs it administers.

III. The Proposed Rule would sanction a host of other forms of discrimination.

By deleting the provisions of the 2016 Final Rule, the Proposed Rule opens the door to a range of discrimination against individuals in the health care context.

For example:

- The Proposed Rule would delete the explicit prohibition against discrimination based on an individual’s association or relationship with someone else based on that other person’s race, color, national origin, sex, age, or disability. By deleting this provision, the Department is sanctioning discrimination such as a doctor refusing to treat a newborn whose parents are lesbians,⁸⁶ an ambulance driver refusing to drive a patient to a hospital because the patient’s parents do not speak English, or a receptionist refusing to book an appointment for a white woman because her husband is black.
- By removing the 2016 Final Rule’s clarification that covered entities could not provide significant assistance to another entity that discriminates, the Proposed Rule would mean, for example, that a Health Insurance Marketplace could contract with navigators

⁸⁴ Musumeci et al., *supra* note 83.

⁸⁵ *Final Rule*, 81 Fed. Reg. at 31,433.

⁸⁶ See Mark Joseph Stern, *Anti-Gay Doctor Refuses to Treat Lesbian Parents’ Six-Day-Old Baby*, SLATE (Feb. 19, 2015, 1:04 PM), <https://slate.com/human-interest/2015/02/doctor-refuses-to-treat-baby-of-lesbian-parents-because-theyre-gay.html>.

who refuse to assist people LGBT people or unmarried couples, something that the 2016 Final Rule made clear was prohibited.

- By eliminating the requirement that covered entities provide notice that they do not discriminate and explaining what to do if someone believes they have faced discrimination, the Proposed Rule will leave people unaware of their rights. This will be particularly harmful to people with limited English proficiency and with disabilities. Without the notice, members of the public will have limited means of knowing that language services and auxiliary aids and services are available, how to request them, what to do if they face discrimination, that they have the right to file a complaint, and how to file such a complaint.
- By eliminating the requirement that covered entities include taglines in the top fifteen languages spoken by individuals with limited English proficiency (LEP) in the state on all significant documents, the Proposed Rule would also significantly harm people who need language access services. Taglines, or short statements in various languages informing individuals of their right to language assistance and how to seek such assistance, currently must be included in significant publications, including notices of nondiscrimination. The Proposed Rule also attempts to eliminate recommendations that entities develop a language access plan.
- By eliminating critical protections for LEP individuals seeking care, the Department is making health care inaccessible for marginalized or linguistically isolated communities. These protections are crucial to minimizing the health care risks LEP individuals face in the health care system, including avoidable hospital readmissions, lower rates of outpatient follow up, limited use of preventive services, poor medication adherence, and lack of understanding discharge diagnosis and instructions. 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. Spanish-speaking LEP Latinx individuals are more likely to report experiencing worse health outcomes than Latinx individuals who are monolingual in English or bilingual in English and Spanish. Since Latina women are less likely than Latino men to be proficient in English,⁸⁷ the Proposed Rule's harmful changes will have a disproportionate impact on Latina women who may experience discrimination on the basis of sex, race, national origin and LEP status.

IV. The Proposed Rule unlawfully attempts to weaken the existing enforcement mechanisms and remedies.

The Proposed Rule seeks to dramatically alter the remedies and enforcement mechanisms under Section 1557 by claiming that the remedies and enforcement mechanisms for each protected characteristic (race, color, national origin, age, disability or sex) are different and limited to those available under their referenced statute. As a result, the proposed rule would create a confusing mix of legal standards and available remedies under a single law and could

⁸⁷ See Jens Manuel Krogstad et al., *English Proficiency on the Rise Among Latinos*, PEW RESEARCH CTR. (May 12, 2015), <https://www.pewhispanic.org/2015/05/12/english-proficiency-on-the-rise-among-latinos/>.

limit claims of intersectional discrimination, going against the text and intent of Section 1557. For example, a pregnant Latina woman who was refused translation services and told by the receptionist that she should go back to where she came from to have her baby would have only the remedies and enforcement mechanisms available under Title VI for the denial of translation services and harassment because of her country of origin *or* those available under Title IX for the harassment because she was pregnant. Under the Proposed Rule, one person who faces intersectional discrimination would have different remedies and enforcement mechanisms for the same incident and under the same law. That is an absurd outcome that is not supported by the text or intent of Section 1557.⁸⁸

The Proposed Rule would delete the provisions in the 2016 Final Rule that recognized a private right of action in federal court. Every court that has ruled on the question has found that the statutory language of Section 1557 confers a private right of action for monetary damages.⁸⁹ The existence of such a right is clear from the statutory language in Section 1557, which explicitly references and incorporates the “enforcement mechanisms” of the four civil rights laws listed—all of which contain a private right of action. This understanding is also consistent with Congress’s intent that civil rights laws be broadly interpreted to effectuate the remedial purposes of those laws.

Additionally, the 2016 Final Rule allows for money damages for violations of Section 1557 in both administrative and judicial actions brought under the regulation. The Proposed Rule attempts to eliminate the regulatory provision providing that money damages are available to those who are injured by violations of the statute. This is contrary to the statute and court precedent.⁹⁰

⁸⁸ See *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *11. (D. Minn. Mar. 16, 2015) (holding that Section 1557 must be interpreted to “create a new, health-specific, antidiscrimination cause of action that is subject to a singular standard, regardless of a plaintiff’s protected class status” because “[r]eading Section 1557 otherwise would lead to an illogical result, as different enforcement mechanisms and standards would apply to a Section 1557 plaintiff depending on whether the plaintiff’s claim is based on her race, sex, age, or disability.”).

⁸⁹ *Rumble v. Fairview Health Servs.*, 2015 WL 1197415 at *11 (D. Minn. Mar. 16, 2015). See, also, *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 845 (D.S.C. 2015); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *4 (E.D. La. Oct. 24, 2017); *Griffin v. Gen. Elec. Co.*, No. 1:15-CV-4439-AT, 2017 WL 8785572, at *3 (N.D. Ga. Dec. 6, 2017), aff’d, 752 F. App’x 947 (11th Cir. 2019); *Audia v. Briar Place, Ltd.*, No. 17 CV 6618, 2018 WL 1920082, at *3 (N.D. Ill. Apr. 24, 2018); *Ass’n of New Jersey v. Horizon Healthcare Servs., Inc.*, No. CV 16-08400(FLW), 2017 WL 2560350, at *4 (D.N.J. June 13, 2017); *York v. Wellmark, Inc.*, 2017 WL 11261026, at *16 (S.D.Iowa Sep. 06, 2017); *Briscoe v. Health Care Serv. Corp.*, 281 F.Supp.3d 725, 737 (N.D. Ill. 2017).

⁹⁰ Courts have held that damages are available under Title VI, Title IX, and Section 504. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (damages remedy available under Title VI for claims of intentional discrimination); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (damages remedy available under Title IX); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (backpay available under Section 504).

V. By opening the door to discrimination, the Proposed Rule will harm individuals' health and increase health disparities.

The combined effect of the Proposed Rule will be to embolden discrimination and make it harder for people who face discrimination to exercise their rights. The impact will be devastating, affecting access to health care for millions across this country and increasing already troubling health disparities.

Certain groups of individuals have historically faced discrimination in health care. For example, despite the historic achievements of the ACA, women – particularly women of color – are far more likely to suffer verbal abuse, stigma, and discrimination by a health care provider.⁹¹ Thirty-three percent of indigenous women reported mistreatment, followed by twenty-five percent of Latina women and twenty-three percent of Black women.⁹² Moreover, when women are able to see a provider, women's pain is routinely undertreated and often dismissed.⁹³ And due to gender biases and disparities in research, doctors offer women less aggressive treatment, or even no treatment, for conditions such as heart disease.⁹⁴

Women of color receive improper diagnoses more frequently, are provided less effective treatments, and are sometimes denied care altogether.⁹⁵ In one report, Black women disclosed that their doctors failed to inform them of the full range of reproductive health options regarding labor or delivery and "pushed certain procedures based not on the patient's best interest but rather based on stereotypes about Black women's sexuality and reproduction."⁹⁶ The cumulative effect of this discrimination is already seen most acutely in black maternal mortality and morbidity rates.

Discrimination, which this Proposed Rule will embolden, reduces access to care and diminishes trust in the health care system. For example, fear of continued racial discrimination in medical facilities deters Black people from utilizing available services.⁹⁷ Due to discrimination, Black

⁹¹ See Saraswathi Vedam et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, REPROD. HEALTH, vol. 16, art. 77 (2019).

⁹² See Saraswathi Vedam et al., *supra* note 91.

⁹³ See CHRONIC PAIN: PSYCHOSOCIAL FACTORS IN REHABILITATION (Eldon Tunks et al., eds., 2d ed. 1990).

⁹⁴ See Laura Kiesel, *Women and Pain: Disparities in Experience and Treatment*, HARVARD HEALTH BLOG (Oct. 9, 2017, 10:30 AM), <https://www.health.harvard.edu/blog/women-and-pain-disparities-in-experience-and-treatment-2017100912562>

⁹⁵ See Lu Chen & Christopher I. Li, *Racial Disparities in Breast Cancer Diagnosis and Treatment by Hormone Receptor and HER2 Status*, CANCER EPIDEMIOL BIOMARKERS PREV, vol. 24(11), 1666 (October 13 2015).

⁹⁶ See Lisa Rosenthal & Marci Lobel, *Stereotypes of Black American Women Related to Sexuality and Motherhood*, PSYCHOL. WOMEN Q., vol. 40(3), 414 (Feb. 17, 2016); See also SISTERSONG, NAT'L LATINA INST. FOR REPROD. HEALTH, & CTR, FOR REPROD. RTS., *Reproductive Injustice: Racial and Gender Discrimination in U.S. Healthcare*, 1, 15-24 (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD_Shadow_US_6.30.14_Web.pdf.

⁹⁷ See Erin Pullen et al., *African American Women's Preventative Care Usage: The Role of Social Support and Racial Experiences and Attitudes*, SOCIOL. HEALTH ILLN., vol. 36(7), 1037 (Apr. 21, 2014).

people reported lower levels of trust in both their physician and in the health care system, as compared to white people. Moreover, Black women were more likely avoid preventive services due to low levels of trust in their primary care provider.⁹⁸

As the Department itself has explained, discrimination has harmful negative health outcomes, especially among racial/ethnic minorities, women, LGBT individuals, older adults, and people with disabilities.⁹⁹ These negative health impacts include depression, suicidal ideation, self-harm, reduced utilization of health care services, worse self-reported health, low birth weight, high blood pressure, and poor health status.¹⁰⁰ And, as the Department has also acknowledged, individuals who live at the intersection of multiple identities experience discrimination differently, which may affect health outcomes.¹⁰¹ Yet despite the clear evidence of the harm of discrimination among individuals who have historically faced and currently still face discrimination, the Proposed Rule would open the door wide for more discrimination.

VI. The justifications put forth in the Proposed Rule are wholly inadequate.

In addition to justifying the Proposed Rule because of a single district court decision, which is improper for the reasons already stated, the Department puts forth additional insufficient and improper reasoning that cannot justify its actions.

a. The Department improperly suggests Supreme Court precedent justifies rolling back civil rights protections.

The Proposed Rule improperly refers to the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*) to support the Department's roll back of Section 1557 protections. *NFIB* held that the Affordable Care Act's Medicaid expansion program was an unconstitutionally coercive use of Spending Clause authority. But that finding was narrowly applied to the Medicaid expansion program and does not affect federal agencies' ability to implement Title IX or Section 1557 or to restrict federal funding if covered entities fail to comply with those laws.¹⁰² Further, if a recipient violates Section 1557, it does not stand to lose all of its federal funding but only the funding that supports the specific discriminatory program. The *NFIB* decision does not change the interpretation of Section 1557 or any other anti-discrimination statute passed under Congress' authority to enforce Section 5 of the Equal Protection Clause or under Congress' spending clause authority.

⁹⁸ See Pullen et al., *supra* note 97.

⁹⁹ See Social Determinants of Health Literature Summaries, *Discrimination*, HEALTHY PEOPLE 2020 (last viewed on Aug. 10, 2019), <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination>.

¹⁰⁰ See Social Determinants of Health, *supra* note 99.

¹⁰¹ See Social Determinants of Health, *supra* note 99.

¹⁰² See Emily Martin, *Title IX and the New Spending Clause*, AM. CONST. SOC'Y FOR LAW AND POL'Y (Dec. 2012) (analyzing the *NFIB* decision and concluding that its holding does not impact Title IX).

Importantly, Federal civil rights laws are intended to create a floor of civil rights protections to which all individuals—regardless of the state they reside in—are entitled.¹⁰³ In upholding civil rights laws, the Supreme Court has explicitly acknowledged that protecting civil rights is a crucial role assigned to the federal government.¹⁰⁴

b. The Regulatory Impact Analysis is insufficient and fails to justify the Proposed Rule.

The Proposed Rule provides a Regulatory Impact Analysis (RIA) that is wholly insufficient to justify the extensive scope of the proposed changes. Agencies are required to account for direct and indirect health costs to the fullest extent practicable, including “outcomes that cannot be quantified but may have important implications for decision-making.”¹⁰⁵ The RIA, however, entirely fails to identify and to quantify costs to protected individuals or to society as a whole. This failure, along with the Proposed Rule’s failure to provide a reasoned explanation for the abrupt reversal of policy, renders the rule arbitrary and capricious.

i. The Proposed Rule failed to consider the costs of discrimination to individuals, the health care system, and the government.

The Department does not account for any of the costs imposed on the general public or our public health systems, even as it acknowledges that the Proposed Rule may increase discrimination and make it less likely that people will exercise their rights. In fact, the Department states that eliminating the notice requirement will mean that an “unknown number of persons are likely not aware of their right to file complaints.” Similarly, the Department acknowledges that the elimination of the notice and tagline requirements “may impose costs, such as decreasing access to, and utilization of, health care for non-English speakers by reducing their awareness of available translation services.” The Department perfunctorily labels the impact as “negligible” while providing no evidentiary basis.

¹⁰³ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (the Supreme Court unanimously holding that it was well within the federal government’s power to enforce civil rights law against a motel refusing to accommodate Black guests); *Katzbach v. McClung*, 379 U.S. 294 (1964) (the Supreme Court rejecting the argument that Congress exceeded its authority to regulate interstate commerce by passing the Civil Rights Act and enforcing the Act against a restaurant that refused to seat Black patrons).

¹⁰⁴ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzbach v. McClung*, 379 U.S. 294 (1964).

¹⁰⁵ U.S. Dep’t of Health and Human Servs., *Guidelines for Regulatory Impact Analysis*, 1, 47 (2016), https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf. “[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). A cost-benefit analysis should account for direct and indirect costs associated with a rulemaking. *Id.* “As a general rule, the costs of an agency’s action are a relevant factor that the agency must consider before deciding whether to act,” and “consideration of costs is an essential component of reasoned decisionmaking under the [APA].” *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732–33 (D.C. Cir. 2016).

The costs, though, are anything but negligible. Ultimately, the discrimination invited by the Proposed Rule will lead to exorbitant costs to the economy. Racial health disparities are associated with substantial annual economic losses nationally, including an estimated \$35 billion in excess health care expenditures, \$10 billion in illness-related lost productivity, and nearly \$200 billion in premature deaths.¹⁰⁶ The Joint Center for Economic and Political Studies estimates that between 2003 and 2006, over thirty percent of direct medical care expenditures for racial and ethnic minorities were excess costs stemming from health inequalities,¹⁰⁷ and eliminating health disparities for minorities would reduce direct medical care expenditures by nearly \$230 billion.¹⁰⁸ Alternatively, exacerbating health disparities – as the Proposed Rule would do – would necessarily drive up the overall cost of health care expenditures.

ii. The RIA did not properly consider alternatives to eliminating the language access and notice requirements

The RIA specifically tries to justify the Proposed Rule by citing to the cost savings of eliminating the language access and notice requirements. The Department's estimate of the burden to covered entities for compliance with the nondiscrimination notice and tagline requirements is based on voluntary actions and interpretations by covered entities. OCR based the elimination of the notice and taglines on these estimates but did not consider whether alternatives, such as further clarification about the requirements, was warranted in the form of FAQs or other guidance. That is, OCR failed to consider alternatives to a complete repeal of notices and taglines that could have appropriately balanced the need to inform individuals of their rights while recognizing there may be a difference in the intentions behind the 2016 Final Rule and how covered entities have interpreted it.

Similarly, the majority of the costs are associated with the provision of a single type of document -- the Explanation of Benefits (EOB). OCR did not consider alternatives as to how it would consider enforcement and interpretation of the "significant document" standard with respect to the provision of multiple EOBs sent during a coverage year.

VII. The Department cannot suspend Subregulatory Guidance, including the Preamble to the 2016 Final Rule.

HHS is bound by the Administrative Procedures Act to provide justification for proposed changes to implementation of law and cannot change current regulations without going through the notice and comment period, considering those comments, and then providing justification for its changes in a new final regulation. However, the Proposed Rule states the Department will suspend all subregulatory guidance regarding the Section 1557 protections including the preamble to the 2016 Final Rule. Suspending this guidance while the current

¹⁰⁶ See John Z. Ayanian, MD, *The Costs of Racial Disparities in Health Care*, HARVARD BUS. REV. (Oct. 1, 2015), <https://hbr.org/2015/10/the-costs-of-racial-disparities-in-health-care>.

¹⁰⁷ See Ayanian, *supra* note 106.

¹⁰⁸ See William Riley, Ph.D, *Health Disparities are Costly for (U.S.) All*, NAT'L INST. OF HEALTH (Apr. 1, 2016), <https://obssr.od.nih.gov/health-disparities-are-costly-for-u-s-all-think-about-it-in-april-and-beyond/>.

regulations remain in effect violates the procedural requirements of the Administrative Procedure Act and signals to covered entities that the Department does not intend to fully enforce Section 1557, as required by law.

The Department cites to the Attorney General's memoranda of November 16, 2017 and January 25, 2018 that provide that that Department of Justice litigators cannot use noncompliance with guidance documents as the basis for proving violations of law in civil enforcement actions. The memoranda, however, do not require the withdrawal of the subregulatory guidance. The information in the subregulatory guidance, especially the preamble to the 2016 Final Rule, allows covered entities to understand the parameters of the regulations and how to comply and can be used by the courts to understand the Department's intent in promulgating the current regulations.

VIII. The Department improperly weakens regulations unrelated to implementation of Section 1557.

The Department improperly proposes to rescind portions of ten separate, unrelated regulations adopted by the Centers for Medicare and Medicaid Services (CMS) between 2006 and 2016 to eliminate protections against discrimination on the basis of gender identity and sexual orientation. In addition, the Department proposes to amend regulations implementing Title IX. These rules do not interpret Section 1557 and were adopted under other unrelated statutory authorities. The Department offers no legal, policy, or cost-benefit analysis regarding these rules, the impacts they have had during the years they have been in place, or the costs and benefits of rescinding them. In fact, each of these provisions is legally sound and a reasonable measure to protect patients and effectively implement statutory programs. The Center specifically comments on the Department's attempt to weaken Title IX; however, it also supports the comments by the National Center for Transgender Equality that address the rescission of the CMS regulations.

a. The Department should not weaken civil rights protections under its Title IX regulations.

In its proposed rule, the Department inappropriately proposes to amend regulations interpreting a wholly different statute from Section 1557 of the ACA. As an initial matter, the Center objects to this procedural bootstrapping of rulemaking on laws outside of the scope of Section 1557. However, given that the Department indicates it will move forward with this inappropriate rulemaking process, the Center responds to the substance of the proposal below.

The Center opposes any attempt to weaken the Department's Title IX regulations, including removing the regulation that explicitly concerns rules of appearance and attempting to incorporate religious exemptions that have no relevance in the education context. It is also particularly troubling that the Department would attempt to undermine civil rights protections in schools through an NPRM that is focused on HHS's Section 1557 regulations concerning nondiscrimination in health care. By attempting to amend its Title IX regulations within broader

changes to Section 1557's rules, the Department seeks to insulate the proposed changes from the thorough public review that they would otherwise receive, rendering the proposed changes procedurally infirm.

- i. *The Proposed Rule's attempt to remove prohibitions against discrimination based on one's appearance is dangerous and threatening to public health.*

The Proposed Rule seeks to remove Title IX regulatory language prohibiting discrimination “against any person in the application of any rules of appearance” in education programs and activities.¹⁰⁹ Contrary to HHS's assertions, the “rules of appearance” regulation appropriately reflects Title IX's prohibitions. Punishing individuals for not conforming to style standards traditionally associated with their sex or for dressing in ways that others may find objectionable—for example, men who have long hair or women who wear pants—is a prime example of treating individuals differently based on sex-stereotyping, which is prohibited under Title IX.¹¹⁰ For the same reason, dress codes discriminate against transgender and gender-nonconforming individuals when they require people to adhere to dress policies that conflict with their gender identity or expression.¹¹¹ The Department claims that removing the “rules of appearance” regulation would eliminate “confusion” about Title IX's protections because no other agency has such an explicit prohibition on discrimination based on appearance or dress codes in its Title IX rules. However, this prohibition is implicit in the Title IX final common rule that was adopted by 20 federal agencies¹¹², which includes Department of State, NASA, Department of Justice and National Science Foundation, and it is implicit in the Department of Education's Title IX regulations. Both the Department of Education's Title IX regulations *and* the Title IX final common rule prohibit schools from “subject[ing] any person to separate or different rules of behavior, sanctions, or other treatment” on the basis of sex, thus reaching dress codes that impose separate rules of behavior on students based on sex, and different treatment based on sex for purported violations of dress codes.¹¹³ Courts have also recognized

¹⁰⁹ *Proposed Rule*, 84 Fed. Reg. at 27,871 (citing 45 C.F.R. § 86.31(b)(5)).

¹¹⁰ *See Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (finding that sex stereotyping can violate Title IX).

¹¹¹ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 255 (1989) (finding that employer's advice for female employee to “dress more femininely, wear make-up, have her hair styled, and wear jewelry” was sufficient evidence of sex stereotyping in violation of Title VII); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010) (“an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination”); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004) (employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are [] engaging in sex discrimination”); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000) (finding sex discrimination where bank instructed customer dressed in “traditionally feminine attire” to go home and change into “more traditionally male clothing” that matched the customer's identification card in order to receive loan application form).

¹¹² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,857, 52,858 (Aug. 30, 2000).

¹¹³ 34 C.F.R. § 106.31(b)(4); 65 Fed. Reg. at 52,870 (Aug. 30, 2000); *see Hayden v. Greensburg Community Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014) (hair length policy that applied only to members of the boys basketball team

dress and style codes that impose different restrictions and requirements on student depending on their sex can constitute discrimination in violation of the Equal Protection Clause of the U.S. Constitution.¹¹⁴ For these reasons, implying that Title IX does not prohibit sex-based discrimination in dress or appearance codes will actually create new confusion about the protections that Title IX provides and invite further litigation against health care providers.

Indeed, explicitly prohibiting discrimination in “rules of appearance” is all the more important in HHS-funded education programs and activities, which will often operate in the health care context and may include provision of patient care. Individuals seeking medical care have the right to equal treatment, regardless of whether their appearance conforms to traditional sex stereotypes. In the school health care context, allowing medical and health providers at a school to deny care to a student or an employee of the institution for something as frivolous as their appearance can result in life or death consequences—directly and immediately threatening the patients’ individual health. While it is an injustice to deny any civil right, such as educational opportunities, because of a person’s nonconformity to sex stereotypes, HHS’s attempt to give medical professionals license to deny students and school employees life-saving treatment based on their appearance is particularly repugnant. And the impact of removing this regulation would have a particularly harmful impact on LGBTQ individuals of color, who already face disproportionate rates of discrimination in health care¹¹⁵ and would embolden providers to discriminate based on how a patient presents themselves. As with many other sections of this Proposed Rule, the decision to remove the “rules of appearance” regulation is clearly intended to further revoke protections against discrimination on the basis of gender identity.

ii. The Department proposes to improperly and impermissibly include a litany of religious and abortion exemptions to Title IX.

The Department attempts to incorporate a laundry list of dangerous federal refusal laws and other abortion restrictions into the Title IX regulations, proposing that Title IX must be “construed consistently with” this litany of laws. As an initial matter, Title IX’s statute already includes provisions regarding abortion and religious entity compliance with the law; therefore, the Department’s proposal is improper given that the law already specifically speaks to these issues. Second, the Department includes several provisions in the laundry list that have no relevance to the Title IX context, and yet the Department fails to explain how any of these laws should “be construed consistently with” Title IX. Take, for example, the Department’s

violated Title IX and the Equal Protection Clause); *but see Peltier et al. v. Charter Day Sch.*, No. 17-cv-30-H, 2019 WL 2352130 (Mar. 28, 2019) (finding that Title IX did not pertain to dress codes because the “rules of appearance” regulation had been removed from other agencies’ regulations).

¹¹⁴ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1320-21 (11th Cir. 2011) (affirming summary judgment for transgender woman who was fired because she appeared at work “wearing women’s clothing”); *Peltier et al. v. Charter Day Sch.*, No. 17-cv-30-H, 2019 WL 2352130 (E.D.N.C. Mar. 28, 2019) (dress code policy requiring girls to wear skirts, skorts, or jumpers violated the Equal Protection Clause); *Sturgis v. Copiah Cty. Sch. Dist.*, No. 3:10-CV-455, 2011 WL 4351355, at *1-4 (S.D. Miss. Sept. 15, 2011) (denying motion to dismiss where school district required female students to wear drapes and male students to wear tuxedos for their senior yearbook portraits).

¹¹⁵ See, e.g., Mirza & Rooney, *supra* note 69; LAMBDA LEGAL, WHEN HEALTH CARE ISN’T CARING (2010), <https://www.lambdalegal.org/publications/when-health-care-isnt-caring>.

suggestion that the Title IX regulations must be read alongside the Helms Amendment. The Helms Amendment is a restriction on abortion funding that applies to U.S. foreign assistance. The Department does not explain how Title IX should be read alongside it, but its inclusion suggests that there are implications that an entity must consider. Thus, the Department unnecessarily creates confusion by suggesting, without explaining, that all of these laws impact Title IX. In fact, the inclusion of provisions such as the Helms amendments better reflects the Department's systemic efforts to attack abortion access and expand religious exemptions whenever it has the opportunity to, even if it lacks any basis to do so, rather than any serious proposal for delineating the rights and obligations of entities subject to Title IX.

The Center strongly objects to the Department's careless, baseless, and ideological incorporation of abortion and religious exemptions to the Title IX regulations.

Conclusion

The Proposed Rule is an unlawful, improper, and unjustifiable attempt to undo current protections against discrimination in health care. It opens the door to allow discrimination in health care, which will have devastating consequences for individuals in this country. For all the reasons stated above, the Department should withdraw the Proposed Rule and fully enforce Section 1557 and the 2016 Final Rule.

Sincerely,



Fatima Goss Graves
President and CEO, National Women's Law Center